United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

913

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,941

ROBERT W. FREEMAN,
Appellant,

v.

STEWART L. UDALL, Secretary of the Interior

and

JOHN W. MACY, JR., L. J. ANDOLSEK,
ROBERT E. HAMPTON,
Commissioners, United States Civil Service Commission,
Respondents.

Appeal from the United States District Court for the District of Columbia

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KEITH L. SEEGMILLER
ISADORE G. ALK
1725 Eye Street, N.W.
Washington, D. C. 20006
Attorneys for Appellant

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Is Operating Rule 801 of the Alaska Railroad that "before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety" so vague and indefinite by reason of its failure to specify the persons to whom the rule is intended to apply and to define their responsibilities, that the discharge of a war veteran entitled to the protection of the Veterans Preference Act predicated upon an alleged violation of the rule cannot stand?

2. Is there any evidence of substance to support the determination of the Alaska Railroad that appellant had violated Rule 801?

3. Is there a rational basis for the decision of the Civil Service Commission reversing its Regional Office and sustaining the action of the Alaska Railroad in discharging appellant?

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BRIEF FOF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from an order of the United States District Court for the District of Columbia denying appellant's motion for summary judgment, granting respondents' cross-motion, and dismissing appellant's complaint.

The action is by a veteran entitled to the protection of the Veterans Preference Act of 1944, as amended (Title 5 U.S.C. § 851 et seq.) for the restoration of his employment by the Alaska Railroad.[1] The lower court had jurisdiction by virtue of the provisions of Title 28, Section 1331 U.S.C. This court has jurisdiction under the provisions of Title 28, Sections 1291 and 1294(1), U.S.C.

STATEMENT OF THE CASE

Appellant is a citizen and resident of the State of Alaska and a veteran entitled to all protection of the Veterans Preference Act of 1944, as amended (5 U.S.C. § 851 et seq.).[2] He was employed as a brakeman by the Alaska Railroad, which is owned by the United States and operated by the Department of the Interior (J.A. 11, 28).

Under the regulations of the Alaska Railroad, a demerit system was in effect which provided for the entry of demerits against the records of an employee. The regulations prescribed that no discipline by record would be made for less than 5 or more than 60 demerits. It was further provided that when an employee's demerits accumulated to 90, he would be dismissed from service. (J.A. 17, 28).

Prior to October, 1963, appellant had accumulated a total of 85 demerits. None of these demerits had been assessed for violation of any rules governing movement of equipment or because of accidents.[3] The validity of the

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[1] Public Law 89-554, 80 Stat. 378, approved September 6, 1966, has codified the general and permanent laws relating to the organization of the United States and to its civilian employees. The provisions of Section 851 have been incorporated into 5 U.S.C. § 2108. The provisions of Section 863 have been incorporated into 5 U.S.C. § 7512 and § 7701.

[2] See Footnote 1, *supra*.

[3] The demerits were for absence from duty without proper leave and for failure to comply with instructions from proper authority

assessment of these demerits is not in issue here.

By reason of an incident occurring on October 3, 1963, appellant was assessed additional demerits which brought the total in excess of 90. As a result, appellant was discharged by the Alaska Railroad. The propriety of the discharge rests upon the validity of the assessment of demerits because of the October, 1963, incident.

The sole basis for the assessment of demerits was an alleged violation of Rule 801 of the Rules and Regulations of the Operations Department of the Alaska Railroad. The regulation appears under the heading "Train or Yard Service" and in pertinent part provides:

> Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety. (J.A. 17, 29)

Before October, 1963, appellant had on two occasions answered questions in the prescribed written examination for trainmen to determine his knowledge of the operating rules of the Alaska Railroad. There was only one question relating to Rule 801. In the 1960 examination the question and answer was:

> Q. Before moving cars or engines in a street or on station or yard tracks, what must be known?
> A. That the cars can be moved with safety.

The 1961 examination included the following:

> Q. Before moving cars or engines in a street or on station or yard tracks, what must be known?
> A. That it is clear and protected. (J.A. 91, 112).

(J.A. 17, 28, 54). In explaining its demerit system, the Alaska Railroad stated: "Due consideration is given to the seriousness of the rule infraction and the employee's personal record when assessing discipline but only for the purpose of arriving at the measure of discipline and never as a factor in determining guilt in the particular case being assessed" (J.A. 99).

The October 3, 1963 Incident

On the evening of October 3, 1963, appellant was working as a "head" brakeman of a yard crew in the yards of the Alaska Railroad at Anchorage, Alaska. The yard crew consisted of a conductor, an engineer, a fireman, a "field" brakeman and a "head" brakeman. The yard crew performs switching operations within yard limits. It makes up trains, spots cars at sidings and removes cars from sidings after unloading has been completed. The conductor, E. J. Ray, was in direct charge of the yard crew. All persons employed on the yard crew were subject to his instructions. Together with the engineer, he was responsible for the safety and proper handling of the trains and for such use of signals and other precautions as might be required (J.A. 11-14, 29; Operating Rules 106, 850, 853, J.A. 12-13).[4]

Next in command was the engineer (engineman). He is in charge of the train in the absence of the conductor and is equally responsible with the conductor for the safety of the train and the observance of the rules. While switching, he and his fireman are required to remain on the engine and give close attention to signals. He is ob-

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[4] Operating Rules 850 and 853 appear under the heading "Trainmen" and provide as follows:

> 850. The general direction and government of a train is in charge of the conductor and all persons employed on the train are subject to his instructions. Should there be any doubt as to authority or safety of proceeding, from any cause, he will consult the engineman who shall be equally responsible with him for the safety and proper handling of the train and for such use of signals and other precautions as the case may require.
>
> Trainmen must be vigilant and cautious; must comply with the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations.
>
> 853. Conductors must assure themselves that their subordinates are competent and instruct them if necessary in the proper performance of their duties. Incompetence and disobedience will not be condoned.

liged to use care when taking or leaving cars (J.A. 13; Operating Rules 850, 921, 922, 923, 928, J.A. 13-14).[5]

The duties of brakemen as such are not specified in the Operating Rules of the Alaska Railroad. Brakemen fall within the category of trainmen. In adding cars to trains, it is the duty of trainmen to see that hand brakes on the cars are released before the cars are moved. Trainmen are required to be vigilant and cautious and when not engaged elsewhere must occupy the posts assigned to them. (J.A. 14; Operating Rules 442, 850, 855, J.A. 13-14).[6]

Appellant was the junior member of the yard crew and on the night in question was acting as "head" brakeman. His duties that night were primarily to work in the vicinity of the engine, coupling or uncoupling it to or from a car or cars. As part of his duties, it was his responsibility to see to it that the hand brakes were released before cars were moved (J.A. 14, 19, 21). The "field" brakeman that night was J. C. Nichols. Although he was working that night in the capacity of a brakeman, his usual duties

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[5] Operating Rules 922, 923 and 928 appear under the heading "Engine Men" and provide as follows:

> 922. Firemen are subordinate to enginemen . . . The Enginemen or fireman must not move the engine or any part of its machinery, unless he knows that it can be done without injury to anyone.
>
> 923. While switching, the engineman and fireman must both remain on the engine and give close attention to signals. Engine must be handled with care while making couplings.
>
> 928. Care must be used when backing to train or to take or leave cars.

[6] Operating Rule 442 appears under the heading "Adding Cars To Train" and Rules 850 and 855 appear under the heading "Trainmen." The text of Rules 442 and 855 are as follows:

> 442. When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved.
>
> 855. Trainmen on duty, when not engaged elsewhere, must occupy the posts assigned to them.

were those of a conductor. He was being used from the Conductors Extra Board and was being paid at conductors' yard rate of compensation. As "field" brakeman, it was his primary responsibility to determine, in areas other than the immediate vicinity of the engine, whether a car (or cars) was safe to move (J.A. 14, 19).

At about 11:50 p.m. on October 3, 1963, the yard crew was instructed by switch list given by their supervising yardmaster to remove an empty box car standing on a siding alongside and to the west of the Air Van Lines Warehouse in the Anchorage yard.[7] The switch engine was backed in a southerly direction toward the empty box car. The engineer and fireman were at their stations in the engine cab—the engineer to the left or east side facing the box car and the fireman to the right or west side. The conductor and the two brakeman were riding on the back platform of the engine as it approached the box car. Mr. Ray, the conductor, was in about the center of the platform; the appellant was standing to his left; and Mr. Nichols, the field brakeman, was to the left of appellant on the lower step of the platform and on the engineer's side of the switch engine. The conductor was aware of the positions occupied by the brakemen and there was no evidence that they were not occupying the posts and carrying out the duties assigned to them by the conductor. (J.A. 14-15, 30).

The night was dark. The headlight of the switch engine was on bright, shining in the direction of the box car. As the switch engine approached the box car, the view of the engineer in the direction of the box car was unobstructed. When the engine met with the box car, Mr.

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[7] The yardmaster has supervision over the yard and is responsible for conditions within yards. All employees of the yard crew are subject to his direction as to movements within the yard. He also was responsible for the proper distribution and placing of cars in the yards and for prompt movement of cars in the yards (Operating Rules 840-42, J.A. 12).

Nichols "made the joint". That is, he gave the signals to the engineer for the meeting and coupling of the engine and the box car. As soon as the engine was coupled to the box car, appellant stood from the back of the engine platform, reached up over the platform railing with one foot on the railing and released the hand brake located on the north end of the box car near the east side. While the hand brake was still spinning and appellant's foot was still on the platform railing, Mr. Nichols gave a signal to go ahead and the engineer immediately started the engine forward in response to the signal (J.A. 15-17, 30).

Unknown to the crew, there was a thin steel platform extending from the warehouse to the box car door on the engineer's side. There was no warning light or other warning signal indicating the presence of the platform. The crew had no reason to suspect the presence of the platform (J.A. 14-15, 46).[5] Moments after the engine had started forward, a noise was heard. The engineer immediately stopped the engine as simultaneously Mr. Nichols gave him a stop sign and appellant yelled to Nichols. The engine had not travelled more than 3 or 4 feet but some damage was caused to the box car and the warehouse. (J.A. 15-16, 30).

The Charges and The Hearing

After the accident, the entire crew was charged by the Alaska Railroad with violation of Rule 801 (p. 3, supra). No violation of any other Rule was charged. (J.A. 39). At the hearing conducted by the Trainmaster, all the members of the crew appeared.

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[5] The conductor testified:

> "it is very evident, that somebody either of the freight house or Air Van Lines is negligent on this particular matter. If Air Van Lines released the car, surely they would have pulled the platform out of the car. So it looks like someone from the freight house had to release the car, without the knowledge of Air Van Lines, which indicates they more or less set a trap for us." (J.A. 46).

The conductor, an employee of the railroad since 1948, testified that neither he nor either brakeman had walked to the far end of the freight car before the signal to proceed was given. He testified further that he saw Mr. Nichols look back and then give the signal to proceed. He ascribed Mr. Nichols' failure to see the platform to the fact that it was very small and thin. He urged that the crew should not be held responsible for someone else's carelessness in failing to remove the platform. (J.A. 15, 41-2, 46).

The engineer testified that his headlights were on the box car and that he was watching the joint (i.e. the coupling). There was no obstruction on the building that obstructed his view between the engine and the car. He started the engine forward when Mr. Nichols gave the signal to proceed and he first became aware that something was wrong when he heard the noise. (J.A. 16, 43-4).

Mr. Nichols testified that he was able to see between the car and the building. (J.A. 16). In explaining why he did not see the platform, he stated:

> "Well, we had the headlight shining from the engine on the box car and it makes it pretty hard to see from the bottom step. I was inspecting the pins and I glanced up and I could see all the way to the building. I never did see the platform. I just gave a go ahead and as soon as I heard the noise I gave him a stop. I always glance down the track to see if it is clear or not and it looked clear to me. I, of course, just took a physical and my eyesight is in need of glasses. I found that out yesterday." (J.A. 16, 44).

Appellant was absent during the conductor's testimony. After his arrival, the conductor was asked whether appellant would be able to give any testimony pertinent to any of the matters gone into. The conductor stated:

> "Mr. Freeman took the hand brake off the car and got back on the engine. He stood from the back engine platform and leaned over the railing of the engine and knocked it off. I was standing in the middle and Nichols was on the lower step of the platform."

Appellant confirmed that he was not on the ground and that what the conductor had stated was true. (J.A. 16-17, 44)

On the basis of the facts set forth above, the Superintendent of Transportation absolved the engineer and fireman of responsibility, even though the engineer admittedly started up the engine knowing that Mr. Nichols had not walked around the freight car. (J.A. 17, 100). The Superintendent determined that the conductor and brakemen were equally guilty of a violation of Rule 801 and directed that 30 demerits be assessed against their records. (J.A. 17, 31).

On October 25, 1963, the Superintendent of Transportation by letter notified appellant of the assessment of the 30 demerits; that this action gave appellant 115 demerits; and that appellant therefore would be separated from the service of the railroad in thirty days. (J.A. 17-18, 36). Appellant made a verbal appeal on November 4, 1963 to the Superintendent of the railroad and his testimony was taken. He testified in pertinent part as follows (J.A. 18-19, 51-54):

> Q. The particular case, Mr. Freeman, concerning the incident that occurred, when moving the car from the Air Van Lines Warehouse, all 3 of the trainmen were together in a position to determine if this car could be moved with safety and this was not accomplished and subsequently the car was moved and damage to the warehouse resulted?
>
> A. That is true, that is very true, but in the same instance we came in there with a light engine tied on to her and when a man jumps on the ground and

gives a go ahead and if the engineer takes it, what is the rest of us going to do. If the man says go ahead, I'd take it, if he gave a sign go ahead then he is taking the responsibility and you are throwing it on the whole crew. We are not going to say to each other, let's all walk around the car.

What am I going to do when I am standing in the middle and reach up and release the hand brake, by this time, it is still spinning, we are going back with her, within just a few seconds, now what am I going to do?

* * * *

Q. But you were in a position with the foreman and other brakeman at the time the car was picked up and an inspection was not made by yourself or the other two men sufficiently to determine if the car could be moved with safety?

A. On this patricular job, the 10:00 o'clock job, I usually played the field. I never went in there without checking when I am playing the field regardless. Now Mr. Nichols was off the extra board and he is a good brakeman and a fast brakeman and we couldn't see the plate. There is a light that you can look right straight on through there, but evidently that plate was only about that thin (indicates with his fingers) and the door was completely down and evidently must have been pulled out far enough where you could not see it. I know I couldn't see it. I didn't even look. I am playing the pin, it is my job to release the brake and we are all standing on the engine. Nichols on my left. Well as a rule, when I was field man I will walk around.

Assuming the joint was made, I reached up to get the brake and by the time I am back down, my foot is still up, but I am in a safe position, the wheels is still spinning and there is nothing I can do. Now I am in the middle, Ed Ray to my right, Nichols to my left and we are already or have started to move and

we didn't move over well, 2 or 3 feet at the very most, or we really would have done some damages.

* * * *

I agree that an inspection should have been made whole heartedly. We should have went back to see, but it is not up to the pin man to go up there because if he done that every night, you couldn't get nothing done. It would be an impossibility, you would be in the wrong place every time.

On November 27, 1963, the Superintendent of Transportation notified appellant by letter of his decision to remove appellant from service effective November 29, 1963. (J.A. 19, 48). Appellant thereupon appealed to the General Manager. In his letter of appeal, he stated (J.A. 23, 90):

"When we made the joint, Nichols was on the ground. The joint was made, and as the slack ran out, I released the brake. I surmised Mr. Nichols had already checked the car. It is the rule for the field man to check the car for safety in movement, whether it be one car or ninety cars you have to rely on him. When I heard the noise, I yelled at Mr. Nichols, being in no position to give a stop sign."

* * * *

"I don't understand the number of demerits assessed for this particular incident. I do not think I should have gotten any."

Under letter dated December 11, 1963, the General Manager sustained the removal action. The letter recited *inter alia* (J.A. 20):

"If your accrual of demerits was of smaller proportion, your case would be susceptible of further consideration because of your position that the number of demerits awarded you was excessive. However, prior to the hearing of October 11, 1963, you already had accumulated a total of 85 demerits. Consequent-

ly, even though the award of demerits was reduced from thirty to ten, or for that matter even to five demerits, the net results would remain unchanged."

"This office, therefore, sustains the decision contained in Mr. Davidson's letter of November 27, 1963."[9]

Proceedings Before The Civil Service Commission

Appellant duly appealed to the Seattle Regional Office of the Civil Service Commission. In his request for review, he stated *inter alia* (J.A. 29, 55):

"I contend that this action against me to be most unjust inasmuch as my duties are primarily that of working in the vicinity of the locomotive, coupling and uncoupling it to a car or cars, and further that it is the duty of the field man and the responsibility of the conductor (switch foreman) in areas other than the immediate vicinity of the locomotive to determine whether a car, or cars are safe to move . . ."

* * * *

"Upon coupling the locomotive to the car # 10353, I immediately started to release the hand brake. At that time it was the field brakeman who gave the engineer the signal to proceed. I was not in any way

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[9] While appellant's appeal to the Civil Service Commission was pending, the General Manager—as the result of an appeal to him on behalf of the conductor—by letter dated January 14, 1964, notified appellant as follows:

"I have reviewed the entire file in the case and, although I feel there was equal responsibility among the crew members, I have agreed with Mr. Shake to adjust the discipline assessed from 30 demerits to 15 for each member of the train crew."

"Although this adjustment reduces your total accumulation of 115 demerits to 100 demerits, it has no effect upon your separation from service of The Alaska Railroad inasmuch as the total accumulation is in excess of the 90 demerits specified in General Circular No. 11 dated January 1, 1959." (J.A. 22).

responsible for the primary movement of this car . . ." [10]

In its response, the Alaska Railroad did not controvert the allegations of fact, but claimed (J.A. 25, 87-88):

> "The three members of the crew were equally responsible for the damage incurred to the car and warehouse because none of the three assured himself the car was safe to move."
>
> * * * *
>
> "In the instant case, Mr. Freeman was equally responsible, under Rule 801, with the other train crew members for the movement and damage incurred, for, as previously described, the three crewmen on the open platform of the locomotive approached the box car and moved same without assuring themselves, collectively or individually, that it was safe to move."

In a rebuttal statement, plaintiff stated (J.A. 26, 96):

> "I could not have had time to get on the ground, even if I desired to inspect the car, and at the same time release the hand brake from the car, before the signal to proceed was given to the engineer. Everything happened so quickly, and I wasn't in a position to view the side of the car at all, as it was my duty to see that the hand brake was released and this I did."

A supporting statement by Mr. Ray, the conductor, was filed. He stated, *inter alia* (J.A. 21-22):

> "I would like to mention that brakeman Freeman and myself were standing on the back platform of the engine at the time it coupled onto Car # 10353

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[10] Appellant also stated that it was brought out at the hearing that Air Van Lines had not released the car for movement; that it was the usual procedure for a car to be released before it was picked up by the switch crew; and that when a car is released, all equipment such as the steel platform is usually released. (J.A. 55). The railroad replied that whether or not the car had been released was irrelevant. (J.A. 89).

at the Air Van Lines Warehouse. At this time Mr. Freeman reached up to knock off any hand brake that the box car may have, before moving it. He did not at any time get onto the ground, before moving this car. Of course he did not know, and could not see around the car from this point of view."

"Mr. J. C. Nichols stated at the hearing that he did get onto the ground when the engine coupled onto the car and before it was moved."

"Having been a brakeman or conductor continuously since 1940 I can state that the assessing of the above demerits to Mr. Freeman was uncalled for."

At the request of the Appeals Examiner, appellant submitted certain diagrams and accompanying explanations. No oral testimony was taken, but both appellant and the Alaska Railroad supplied additional information requested by the Examiner. (J.A. 22, 98-100) By its decision of March 20, 1964, the Regional Office reversed the Alaska Railroad decision and directed that appellant be restored to his former position (J.A. 57-61). This decision stated (J.A. 23):

"The appellant has not raised any question with respect to the assessment of demerits on previous allegations of violations of Rule 701. This office has concluded therefore, that the only issue involved is whether or not the appellant did or did not violate Rule 801 on October 3, 1963. More specifically, the question is whether the appellant has been properly charged with violating that portion of Rule 801 which reads, 'Before moving cars or engines in a street, or on a station yard tracks, it must be known that the cars can be moved with safety'."

It found:

"In the light of testimony as to what the employees involved saw as they approached the freight car; the physical duties performed by Mr. Nichols and the appellant; in the absence of any evidence to establish

a direct responsibility insofar as the appellant is concerned for the determination of physical conditions around the freight car; and in part upon the statements as to responsibility recited in Rules 841 and 850 this office finds that the evidence relied upon by the agency in reaching a decision that the appellant was in violation of Rule 801 is insufficient and that the assessment of demerits against the appellant's record was in error."

And it concluded:

"In conclusion we find that the charge against the appellant in light of the evidence adduced has not been substantiated and the action in separating the appellant from his position was unwarranted. Action to restore the appellant to his former position retroactive to the day of his separation is directed."

The Alaska Railroad appealed to the Board of Appeals and Review of the Civil Service Commission. (J.A. 62-77). No testimony was taken before the Board, which decided the appeal on the basis of the record before the Regional Office. The Board of Appeals and Review reversed the decision of the Seattle Regional Office and sustained the assessment of the demerits and the discharge of plaintiff. (J.A. 83-86). The Board stated (J.A. 24, 85):

"Concerning the clarity of Rule 801, the Board does not find such ambiguity therein as to justify a conclusion that the rule did not fix responsibility upon Mr. Freeman, as well as upon Messrs. Ray and Nichols, in the circumstances of the accident which took place on October 3, 1963, at Air Van Lines Warehouse. The record shows that Mr. Freeman started releasing the hand brake on Car # 10353 immediately after the coupling of the locomotive to the car and before Nichols had given the signal to move the car. Mr. Freeman's action in releasing the hand brake was not specifically directed by the conductor, and Mr. Freeman took that action without

> assuring himself that the car could be moved with safety. In this connection, Mr. Freeman's statement in his appeal to the Railroad's General Manager was, 'I surmised Mr. Nichols had already checked the car.' In the opinion of the Board, Mr. Freeman thus implicitly admitted his violation of Rule 801, and the fact that two other members of the same crew including the conductor, were also in violation of the same rule does not absolve Mr. Freeman of his responsibility."

An appeal from this action was taken by appellant to the Commissioners of the Civil Service Commission who sustained the decision of the Board of Appeals and Review. The Commissioners found "that the current representations raise no new issues and fail to demonstrate probable error in the previous decision of the Board of Appeals and Review." (J.A. 24).

Having exhausted his administrative remedies, appellant commenced the instant action.

Facts Not Appearing In The Certified Administrative Record

In proceedings involving other parties and a different incident the Secretary of the Interior, by his Assistant Secretary for Administration, found "a lack of understanding as to the effect of instructions, or lack of instructions, by the yardmaster on the responsibility of individual crew members for determining that cars can be moved with safety under operating Rule 801." (J.A. 25). The Secretary stated:

> "I am asking the General Manager to take appropriate steps to insure that the responsibilities of individual crew members, the Yardmaster, and others who may be involved in switching movements are clearly defined in writing, and understood by all affected employees." (J.A. 25).

The Railroad has not disclosed what action it has taken to comply with the Secretary's directive.

Although the General Manager has claimed that rules virtually identical to Rule 801 appear in operating codes of other railroads, he did not quote from any other code. (J.A. 64, 104). The Consolidated Code of Operating Rules, Edition of 1959, which is used by the railroads mentioned in the General Manager's affidavit contains the following rule (J.A. 113):

> 810. Before coupling to or moving cars or engines in a street, or on station or yard tracks, it must be known that cars are properly secured and that they can be moved with safety.

The Consolidated Code does not contain any rule similar to Rule 442 of the Alaska Railroad Operating Rules which provides as follows (J.A. 113):

> 442. When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved.

In an affidavit filed below, the Secretary of the Interior has stated the Department's position that Rule 801 is not void for indefiniteness and has defined the responsibility under the rules as follows (J.A. 102-103):

> Rule 801 placed the responsibility for preventing accidents due to the movement of cars upon each crew member of a train or yard crew who is in a position to check whether a car can be moved with safety. A member of a crew in a position to determine whether a car can be moved with safety cannot excuse his failure to perform this duty by assuming that some other member of the crew was making the necessary check.

STATUTE AND RULES INVOLVED

The statute involved is the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, 58 Stat. 387, as amended, 5 U.S.C. § 851 et seq., the relevant section of

which is reprinted in the Supplement, *infra*, pp. 39-40.[11] Specifically involved here is Rule 801 of the Rules and Regulations of the Operations Department of the Alaska Railroad, p. 3, *supra*. Also relevant are Operating Rules 106, 442, 840-42, 850, 853, 855, 921, 923 and 928, appearing in the Joint Appendix, pp. 12-14.

STATEMENT OF POINTS

1. The lower court erred in refusing to hold that Rule 801 of the Operating Rules of the Alaska Railroad as applied to appellant's responsibility under it is so vague and indefinite that the assessment of demerits against him predicated upon a violation of the rule cannot stand.

2. The lower court erred in its holding that Rule 801 of the Operating Rules of the Alaska Railroad gave appellant fair and adequate notice of his responsibility thereunder.

3. The lower court erred in failing to hold that there was no evidence of substance to support the determination of the Alaska Railroad and of the Civil Service Commission that appellant had violated Rule 801.

4. The lower court erred in holding that the Civil Service Commission's decision sustaining the action of the Alaska Railroad in discharging appellant was not arbitrary and capricious and that there was a rational basis for the finding that appellant had violated Rule 801.

5. The lower court erred in denying appellant's motion for summary judgment and in granting respondents' cross-motion for summary judgment.

SUMMARY OF THE ARGUMENT

1. The propriety of the discharge of appellant rests upon the validity of the assessment of demerits because

[11] See Footnote 1, *supra*.

of the October, 1963, incident. The sole basis for the assessment of the demerits was the alleged violation of Rule 801 of the Operating Rules of the Alaska Railroad. Consequently, the propriety of the Alaska Railroad's action in discharging the plaintiff must stand or fall on Rule 801 and a *post hoc* rationalization of the agency's action is not acceptable.

2. Rule 801 is so vague and indefinite that the demerits assessed against the record of appellant based upon the alleged violation of the rule cannot stand. Rules and regulations which are the basis for disciplinary action must be sufficiently clear and definite so that they may be understood by those against whom they are directed. Rule 801 manifestly does not pass this test. The persons subject to the rule are not mentioned nor does the rule prescribe duties for any particular employee. Yard masters, conductors, engineers, firemen, brakemen and others are all involved in switching operations. In order for the rule to pass muster it must clearly specify the persons to whom the rule is intended to apply and to define their responsibilities. As the rule stands, one can only speculate. Originally, the railroad took the position that there was a collective responsibility. But the action of the railroad in exonerating the engineer and fireman belies such an application of the rule. The railroad then took the position that the rule places responsibility upon each member of the crew who is in a position to check whether a car can be moved with safety. If this was the purpose of the rule, it should have been spelled out in the rule and not left to *post hoc* rationalization. But even this interpretation does not satisfy the need for clearness and definiteness. What is meant by "position to check"? Does it apply to the engineer who was the one person in the crew other than Nichols who knew that the signal to proceed was given before a physical check was made? Does it apply to someone like the appellant who was engaged in the performance of another duty under a different rule, that

of seeing that the hand brake was released before the car was moved? Discharge of the appellant cannot rest upon such a vague and nebulous interpretation of the rule. The Secretary of the Interior was on sound ground when he ordered the railroad to make its rule more specific and meaningful.

3. Even assuming that the rule, as now interpreted by the Railroad and the Secretary of the Interior, passes the test of definiteness, there is no evidence of substance to support the determination that appellant had violated the rule. After the engine and freight car were coupled, appellant did what he was required to do under another operating rule, Rule 442. This rule was specific and definite and by its terms was directed to trainmen. It required trainmen to "see that hand brakes are released" before the car was moved. This was a duty which it is undisputed was appellant's responsibility just as remaining in the engine and giving attention to signals was the responsibility of the engineer. In carrying out this responsibility, appellant could not see around the car. And after releasing the hand brake, he had no opportunity to get off the platform and make a physical inspection. He did not know that a signal to proceed would be given by Nichols before a full inspection had been made. On the record made, the regional office was clearly right in determining that the evidence relied upon by the railroad in reaching its decision that appellant had violated Rule 801 was insufficient.

4. There is no rational basis for the decision of the Board of Appeals and Review reversing the regional office and sustaining the discharge. There was no rule which required the appellant to assure himself that the freight car could be moved with safety before he released the hand brake. The release of the hand brake did not cause the movement of the freight car. The car was moved by reason of Nichols' signal and the engineer's action in response to the signal. The opinion of the Board that be-

cause appellant "surmised" Mr. Nichols had already checked the car, he implicitly admitted his violation of Rule 801 is not even a reed for such a conclusion. The Board merely has put up and knocked down a straw man when it says that appellant's action in releasing the hand brake was not specifically directed by the conductor. The fact is that the conductor knew and approved of appellant's action. The conductor stated categorically that the assessment of demerits against appellant was uncalled for. What the Board has done here is to engage in *post hoc* rationalization not warranted by the evidence.

5. This court, as it did in *Weinberg* v. *Macy*, 124 App. D.C. 364, 365 F.2d 897, should direct the lower court to enter judgment reversing the action of the Civil Service Commission and directing the Commission (i) to reverse the discharge order of the Alaska Railroad and (ii) to direct the Alaska Railroad to reinstate the appellant to his position and to restore to him such pay as he failed to receive after his discharge until the date of his reinstatement.

ARGUMENT

I

The propriety of appellant's discharge must be judged by the grounds invoked by the Alaska Railroad—violation of Operating Rule 801.

It is established law that the propriety of appellant's discharge must be judged and appraised by the grounds which the agency selected for its decision. *Bond* v. *Vance*, 117 App. D.C. 203, 327 F.2d 901; *Mendelson* v. *Macy*, 123 App. D.C. 43, 356 F.2d 796. As the Circuit Court of Appeals for the 9th Circuit, citing with approval decisions from this Circuit, recently said in *Alaska Steamship Co.* v. *Federal Maritime Commission* (CA 9th) 344 F.2d 810, 866:

> *Post hoc* rationalizations for agency action are unacceptable.

The sole basis asserted by the Alaska Railroad for the assessment of the demerits against appellant which resulted in his discharge was his alleged violation of Operating Rule 801. The violation of no other rule was charged or found. If appellant did not violate Rule 801, then the assessment of the demerits was unwarranted, appellant's discharge was in violation of his rights under the Veterans Preference Act of 1944, as amended, and appellant is entitled to the restoration of his employment.

It is not clear from the record in this proceeding whether the Alaska Railroad assessed the demerits against the appellant on the theory of collective responsibility or on the theory of individual violation of Rule 801. On either theory, the assessment of demerits against the appellant was unwarranted and arbitrary and his discharge was unlawful.

II

Rule 801 is so vague and indefinite that demerits based upon an alleged violation of the rule cannot stand.

As a veteran entitled to the benefits of the Veterans Preference Act, appellant could not be discharged "except for such cause as will promote the efficiency of the service". (5 U.S.C. § 863, now 5 U.S.C. § 7512). We think it elementary that good cause is not shown when the rules and regulations which are the basis for the disciplinary action are so vague and indefinite that the persons against whom the rules are directed and their responsibilities cannot readily be determined. In this respect, regulations, infractions of which may result in loss of a person's employment and impair his livelihood, are similar to statutes or regulations which impose criminal or civil penalties for their violation. The Courts have made clear that an enactment which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and dif-

fer as to its application violates the first essential of due process. *Connolly* v. *General Construction Co.*, 269 U.S. 385. It is not the penalty which is invalid, "but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no standard at all." *A.B. Small* v. *American Sugar Refining Co.*, 267 U.S. 233; *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210. This is a principle which has application as well in civil as in criminal legislation. *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 463.

The employees of the Alaska Railroad should not be required at peril of disciplinary action to speculate as to the meaning and application of the operating rules. The rules should be sufficiently clear and precise so that the employees to whom the rules are intended to apply and their responsibilities under the rules can be determined by men of common intelligence.

Measured by these standards, it is apparent that Rule 801 is vague and indefinite. The rule appears in the book of Operating Rules under the heading "Train or Yard Service." The rule is couched in impersonal terms and the persons against whom the rule is directed are not specified. The rule in pertinent part merely recites:

> *Before moving* cars or engines in a street, or on station or yard tracks, *it must be known* that the cars can be moved with safety. (Emphasis supplied)

Not only are the categories of employees to whom the rule is directed unspecified but the rule also does not prescribe duties for any employee or category of employees. Yard masters, conductors, brakemen, enginemen, firemen and many other employees are engaged in train or yard service. Each one has some function to perform with respect to the movement of cars. Yet the rule does not define which categories of employees are subject to the rule. Before a car is moved it is placed upon a switch list. Are the persons who prepare the switch list engaged

in moving the cars within the meaning of Rule 801? Before preparing the switch list, is it their duty to ascertain whether the cars can be moved with safety? As applied to this case, did they have an obligation to check with the Air Van Lines to ascertain that the freight car could be moved with safety? The yard master is responsible for conditions in the yard and for the proper distribution and placing of cars in the yard. Is he engaged in moving cars within the meaning of Rule 801? Does the rule require that before he orders a car to be placed on a switch list that he check to determine whether the car can be moved with safety? The conductor is responsible for the direction of the yard crew and all members of the crew are subject to his instructions. It is his duty under Rule 853 to instruct them if necessary in the performance of their duties. Is the conductor engaged in moving a car within the meaning of Rule 801? Is it the conductor *who must know* that the freight car can be moved with safety? The engineer and firemen are required to stay in the cab and give close attention to signals. They are under a positive duty prescribed by Rule 922 not to move the engine unless they know that it can be done without injury to anyone. It is the the engineer who actually moves the car. Is it he and his assistant, the fireman, to whom the rule applies? Does the rule require that the engineer may not move his engine in response to a signal unless *he knows* that the car can be moved with safety? The brakemen have a variety of duties. Among others they are required to see to it that hand brakes are released before a car is moved. When not engaged elsewhere they are required to occupy the posts assigned to them. Is a brakeman engaged in the performance of a duty assigned to him obliged to know that the car can be moved with safety? Or is the trainman who has the responsibility of giving the signal to proceed to the engineer the one who must know that the car can be moved with safety? Or are all the persons who had anything to do with the

movement of the car charged collectively with the responsibility of knowing that the car can be moved with safety? The persons affected by the rule is left to speculation and conjecture. Men of common intelligence necessarily must guess as to the meaning of the rule and differ as to its application. Discharge of the appellant cannot rest upon a rule which is so vague and indefinite that it is no rule at all.

The Alaska Railroad in its submission to the Board of Appeals and Review and in the brief in the court below laid stress upon the fact that appellant had been examined on two occasions as to the meaning of the Rule. In each examination, there was only one question directed to Rule 801, namely: "Before moving cars or engines in a street or on station or yard tracks, what must be known?" In the first examination, applied replied: "That the cars can be moved with safety." In the second examination, he replied: "That it is clear and protected." These questions and answers clearly throw no light on the meaning and application of the rule. No question was asked in the examination with respect to who had the duty of knowing. There were no questions dealing with the allocation of duties among members of a train crew or with the extent to which one member of a crew has a duty to check upon the performance by another of the duties assigned to him.

It would appear that the railroad first premised its action against the appellant on a theory of collective responsibility of the members of the crew. Thus, in its response to appellant's appeal to the Seattle Regional Office, the railroad claimed:

> "The three members of the crew were equally responsible for the damage incurred to the car and warehouse because none of the three assured himself the car was safe to move." (J.A. 87).

After the Seattle Regional Office ordered appellant's reinstatement, the Railroad adopted a new theory. It un-

doubtedly realized that a theory of collective responsibility was not consistent with its action in exonerating the engineer and fireman. They were members of the yard crew, along with the conductor and two brakemen. If the Rule meant that all the members of the crew were charged collectively with the obligation *of knowing* that the car could be moved with safety, so that the dereliction of one member of the crew would be imputed to the other members, then the engineer and firemen too should have been disciplined. But they were not.

Consequently, in its appeal to the Board of Appeals and Review, the railroad dropped the theory of collective responsibility under the rule.[11a] Instead the railroad rationalized that the rule only applied to every member of a train crew *who is in a position to know* whether a car can be moved with safety. (J.A. 71).[12] This refinement of the rule hardly helps the situation. What is meant by *position to know?* Again one can only guess and speculate. Railroaders necessarily must guess as to its meaning and differ as to its application.

Does the interpretation of the rule as now urged by the railroad mean that responsibility is limited to members of the yard crew and then only to those members of the crew who are in a *position to know?* Is *position to know* equated with physical ability to make a check regardless

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[11a] Likewise in the court below, respondents disclaimed the theory of collective responsibility. In their brief they stated:

> "The responsibility does not extend to employees who are not in a position to check whether a car can be moved with safety. The natural reading of the rule resulted in the exoneration of the engineman and fireman for the accident of October 3, 1963." (Memorandum of Defendant, p. 3)

[12] The General Manager of the railroad claimed to the Board of Appeals that "any railroader knows that Rule 801 applies to every member of a crew who is in a position to know that a car can or cannot be moved with safety." (J.A. 71).

of the duties allocated to and being performed by a member of the crew?

As appears from the record in this case, members of a train crew have various duties to perform in switching cars. These duties are performed under the direction of the conductor. Does the rule as now interpreted by the railroad mean that every member of a crew, other than the engineer and fireman, must, notwithstanding he is engaged in the performance of duties assigned to him by the conductor and required to be performed under the operating rules, nevertheless check the cars for safety of movement if physically he can do so? Does the rule mean that before carrying out the specific duties allocated to him he must make a check for safety of movement if he physically can do so? For example, must a brakeman who is required to throw a switch first check to see whether the car or cars can be moved with safety when there is another brakeman in the crew who specifically has this latter duty? Must a brakeman assigned to and carrying out the duties assigned to him check to make certain that the other members of the crew have properly carried out their duties? As applied to this situation, was Nichols as field brakeman obliged to climb up the ladder on the freight car and make certain, before he gave the signal to proceed, that appellant had completely released the hand brakes? Did appellant in turn have a duty to go around the freight car and check it for safety of movement before releasing the hand brake, even though it was Nichols' responsibility that night to check the car for safety in movement? Suppose that the obstruction here had not been the platform but a rock under a rear wheel of the freight car. Suppose further that Nichols had walked around the car but had not seen the rock. Was it nevertheless appellant's duty to also walk around the car, because physically he could have done so before releasing the hand brake? Manifestly, an interpretation which would re-

quire a member of a crew to duplicate the work to be done by another member of the crew would result in hopeless confusion, recrimination and inefficiency. If this is the intent and meaning of the rule, appellant and the other members of the crew were entitled to be told in advance that this was what the rule meant. Of course, accidents might be cut down if every member of a yard crew checked cars for safety before they were moved. But can you imagine what would happen if one member of a crew said to another, "I am not satisfied that you have performed your job properly. I'm going to do it over." The proper functioning of yard crews requires that every member of a crew carry out the duties assigned to him. One member of a crew is entitled to rely on the other members carrying out their assigned duties.[13] If Rule 801 was intended to deprive him of that right and to require him to perform safety checks assigned to other members of the crew, this duty should have been spelled out with preciseness and definiteness.

The evidence in this case is without dispute that Nichols was the "field" brakeman and appellant the "head" brakeman. One had the responsibility to check the car for safety of movement; the other to release the hand brake. They interpreted the rule as meaning that each could rely on the other carrying out his responsibility. Can it be said that their interpretation and understand-

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[13] In the court below, respondents stated:

> "The Rule, on the one hand, cannot be construed to require each employee to duplicate each safety check that he knows has been made by another employee. On the other hand, it cannot be understood to permit an employee to omit a safety check that he is in a position to make, on the mere assumption that another employee has made the necessary check." (Memorandum of defendants, p. 4).

This is double talk, pure and simple. The rule contended for by respondents means that every employee must assure himself that the other employees are properly carrying out their duties. The only way this can be done is by duplication of effort.

ing of the rule is less reasonable than that now urged by the railroad. A rule subject to such opposite interpretations manifestly is vague and indefinite.

The glaring indefiniteness of this rule has officially been recognized by the Interior Department. In a letter dated September 1, 1965, involving a different accident and different parties, the Assistant Secretary for Administration directed that a letter of reprimand based upon alleged violations of Rule 801 be rescinded. The Assistant Secretary took note of the lack of understanding of the scope and application of Rule 801 and stated:

> "I am asking the General Manager to take appropriate steps to insure that the responsibilities of individual crew members, the yard masters, and others who may be involved in switching movements are clearly defined in writing, and understood by all affected employees." (J.A. 25)

In his affidavit filed below (J.A. 102), the Secretary of the Interior has stated that notwithstanding this letter, the Department's position is "that there is no doubt about the validity of Rule 801, and specifically that the Rule is not void for indefiniteness." The Secretary states that Rule 801 places the responsibility for preventing accidents due to the movement of cars upon each member of a train crew *who is in a position to check* whether a car can be moved with safety. With all deference to the Secretary, his contention that the rule is not vague and indefinite is hardly consistent with his Department's letter of September 1, 1965. Significantly, neither the Alaska Railroad nor the Secretary has disclosed what action was taken by Railroad "to clearly define in writing" responsibilities under the rule and to make sure that it was understood by all affected employees.

The ambiguity inherent in Rule 801 is enough to prevent the assessment of demerits against the appellant. This ambiguity is not resolved by the *post hoc* interpre-

tation of the rule now accorded by the Alaska Railroad and the Secretary of the Interior.

III

There is no evidence of substance to support the determination that appellant violated Rule 801.

The standard of judicial review in cases of this character is whether there is evidence of substance to support the action of the Alaska Railroad. The court will scrutinize the record to see whether it is so lacking in support as to make the action arbitrary and capricious. *Dabney* v. *Freeman*, 123 App. D.C. 165, 385 F.2d 533; *Pelicone* v. *Hodges*, 116 App. D.C. 32, 320 F.2d 754; *Bond* v. *Vance*, 117 App. D.C. 203, 327 F.2d 901. If there is no rational basis in the evidence for the conclusion reached by the Railroad and the Civil Service Commission, the action in assessing the demerits was arbitrary and appellant must be restored to his position. *Eustace* v. *Day*, 114 App. D.C. 242, 314 F.2d 247; *Mendelson* v. *Macy*, 123 App. D.C. 43, 356 F.2d 796; *Alaska Steamship Co.* v. *Federal Maritime Commission*, (CA 9th) 344 F.2d 810. The ultimate findings and conclusions must flow rationally from the basic findings of fact. The basic findings must be supported by evidence of substance.

It is submitted that there is no evidence of substance in the administrative record which supports the determination of the Alaska Railroad that appellant violated Rule 801. There were no facts developed at the hearing before officials of the Alaska Railroad or in the proceedings before the Civil Service Commission which support their action.

In its appeal to the Board of Appeals and Review, the Railroad contended:

> "Obviously *someone* had a direct responsibility to examine the physical conditions or Rule 801 might as

well be removed from the book of operating rules." (J.A. 70)

Assuming, *arguendo*, that Rule 801 is sufficiently definite to impose on *someone* the duty to examine the physical conditions; and assuming further that such nebulous *someone* is every member of a yard crew who is in a position to check whether a car can be moved with safety, the evidence here establishes with clarity that appellant did not fall in this category.

The evidence is undisputed that on the evening in question, appellant was acting as "head" brakeman and Mr. Nichols as "field" brakeman. The duties assigned to him as "head" brakeman were to work in the vicinity of the engine, coupling or uncoupling it to a car or cars. It was also his duty to see to it that the hand brake on the empty freight car was released before it was moved. (J.A. 44, 52, 55, 96). The primary responsibility of Mr. Nichols as "field" brakeman was to determine, in areas other than the immediate vicinity of the switch engine, whether a car or cars could be moved with safety. *The Alaska Railroad presented no evidence that the allocation of functions as described by appellant was inaccurate in any respect.* The conductor in charge of the crew made it clear that appellant was carrying out his assigned duties at the time of the accident. (J.A. 21). There was only one freight car to be moved.

Of course, when the engine was coupled to the freight car, appellant physically could have shoved past Mr. Nichols who was then standing on the steps of the platform leading to the ground and could have walked around the freight car. Likewise, from a physical standpoint, the engineer and the fireman could have stepped down from the engine and made the same inspection. But, in the words of the General Manager of the Railroad, "the engineer and fireman are normally not required to step down from the cab of a locomotive to determine whether a par-

ticular car can be moved with safety because their duties normally require them to man the locomotive controls and maintain a lookout from the cab." (J.A. 105). So also the appellant had other duties to perform and *he was at his station* performing these duties when Nichols gave the signal to proceed. He was performing a duty which was spelled out in positive terms:

> When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved. (Rule 442)

We emphasize the evidence is unchallenged that the performance of this duty was appellant's responsibility. It required him to occupy a position which made it impossible for him to even look down the side of the freight car to ascertain whether there were any obstructions to its movement.[14] If the engineer and fireman were not "in a position to check" because of the duties assigned to them, how can it rationally be claimed that appellant's situation was otherwise.

The evidence is also without dispute that after releasing the handbrake, appellant had no opportunity to walk around the freight car and make a physical inspection. The signal to proceed was given by Nichols immediately without warning to appellant and without his direction. Appellant had not even been able to return both feet to the platform of the engine when the signal to proceed was given. The wheel of the hand brake was still spinning and one of appellant's feet was still on the railing when

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[14] Appellant graphically stated in his appeal to the Seattle Regional Office: "In order to have been able to see from my position on the engine platform, the platform between the car and the warehouse door, my eyesight would have to of been such as to see through the end and side of the steel box car bulkheads in the darkness of night." (Letter from Robert W. Freeman to J. J. Murray, Appeals Examiner, March 10, 1964).

Nichols gave the signal to proceed.[15] How, under these circumstances can it be rationally claimed that appellant was in a position to check whether the car could be moved with safety before it was moved. How was he supposed to know that Nichols would give a notice to proceed without an adequate check?

We reiterate that after the engine was coupled to the freight car, appellant's duty was to release the hand brake on the freight car. There was only one car to be moved. There was another brakeman on the steps of the platform who had the assignment of checking the freight car for safety of movement. There was no evidence that appellant knew or should have known that an adequate inspection would not be made by Mr. Nichols. There is absolutely nothing in the record upon which to base a conclusion that before releasing the hand brake, appellant should have satisfied himself that Nichols had made or would make an adequate inspection.[16]

There is no operating rule of the Alaska Railroad which requires that hand brakes should not be released before it is known that the car can be moved with safety. Indeed, such a rule would serve no useful purpose. After the engine is coupled to the freight car, there can be no

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[15] Appellant stated:

> "I could not have had time to get on the ground, even if I desired to inspect the car, and at the same time release the hand brake from the car, before the signal to proceed was given to the engineer. Everything happened so quickly, *and I wasn't in a position to view the side of the car at all, as it was my duty to see that the hand brake was released and this I did.* (J.A. 21, 98) (Emphasis supplied)

[16] Had appellant been the "field" brakeman, he would have walked around the freight car. (J.A. 52). In his testimony before the Superintendent of Transportation, he agreed wholeheartedly that an inspection should have been made, but he stated that it was not up to the "pin man" to do it. As he testified: "if he done that every night, you couldn't get nothing done. It would be an impossibility, you would be in the wrong place everytime." (J.A. 53).

movement until the engine moves. If the Alaska Railroad intended that hand brakes should not be released until after it was known the car could be moved with safety, it should have so provided in its rules.

In his submission to the Board of Appeals and Review (J.A. 64) and in his affidavit below (J.A. 104), the General Manager of the Alaska Railroad seemed to rely on what he called a "virtually identical" rule in effect on a large number of railroads. The fact is that the Consolidated Code of Operating Rules used by the railroads specified by him has a rule quite different in scope. That rule is Rule 810 and provides:

> *Before coupling* to or moving cars or engines in a street, or on station or yard tracks, it must be known *that cars are properly secured* and may be moved with safety. (Emphasis supplied).

We have been unable to find any rule similar to Operating Rule 442 of the Alaska Railroad.

What appellant's responsibility would have been under such a rule which prevents coupling of cars before it is known that the cars may be moved with safety need not be determined here. It suffices merely to point out the difference in the rules.

It is also beside the point for respondents to cite precedents under other rules and other conditions. No one will disagree that safety is of the utmost importance in railroad operations. The Alaska Railroad has a rule which requires trainmen to be vigilant and cautious. (Rule 850, J.A. 13). But it is important to remember that appellant was not charged with violation of this Rule. He was charged only with violating Rule 801 and his discharge must stand or fall on Rule 801 and *not* on alleged violations of general safety rules.

IV

There is no rational basis in the evidence for the *post hoc* rationalization of the Civil Service Commission.

The Board of Appeals and Review of the Civil Service Commission rejected the decision of the Seattle Regional Office that violation of Rule 801 was not supported by the record. The Board agreed that the record showed that appellant started releasing the hand brake on the freight car immediately after the coupling of the locomotive to the car and before Mr. Nichols had given the signal to move the car. Appellant's action, the Board reasoned, was not specifically directed by the conductor and was taken by appellant on his own initiative without first assuring himself that the car could be moved with safety. The Board made no mention of appellant's repeated undisputed testimony that it was his duty under Rule 442 to release the hand brake. The Board also closed its eyes to the fact that appellant was performing this duty under the very eyes of the conductor and with his approval. Further, the Board paid no attention to the fact that Rule 442 contains no requirement that before the hand brake is released, it should be known that the car could be moved with safety. The Board also failed to consider the fact that the release of the hand brake did not cause the movement of the freight car. The engineer acted upon the signal given him by Mr. Nichols. The premise of the Board that the plaintiff had a duty not to release the hand brake until he knew that the freight car could be moved with safety finds no support in the evidence and falls of its own weight.[17]

The Board also rested its conclusion that appellant somehow had violated Rule 801 by quoting out of context an isolated statement by appellant that he "surmised Mr.

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[17] Again it should be pointed out that appellant was not charged with violation of any rule other than Rule 801.

Nichols had already checked the car,"[18] and concluded that because of this "surmise" appellant had implicitly admitted his violation of Rule 801. (J.A. 24, 84).

This *post hoc* rationalization has no rational basis. Whether appellant surmised that Mr. Nichols had checked the car for safety in movement before appellant released the hand brake is completely irrelevant. The plain fact is that it was appellant's duty to release the hand brake before the car was moved. As far as this duty was concerned, there is no rule of the Alaska Railroad which prescribes that he should delay the performance of the duty until after car had been checked for safety in movement. The further undisputed fact is that it was Mr. Nichols' duty as "field" brakeman to check the car to make certain that it could be moved with safety. If Mr. Nichols could not make the check by visual inspection, it was his duty to walk around the car. Appellant had no reason to suspect before he released the hand brake, that Mr. Nichols would not carry out his duties with vigilance and caution. No doubt the engineer had also surmised that the visual check by Mr. Nichols was adequate for he acted upon Mr. Nichols' signal, *knowing* that Nichols had not walked along the length of the freight car before giving the signal. Nichols himself thought that his visual inspection was adequate. He did not know that his eyesight was bad and that he needed glasses (J.A. 16, 44). To hold appellant responsible under these circumstances is to impose a doctrine of collective responsibility not provided by the Rules and belied by the railroad itself when it exon-

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[18] Appellant's statement was as follows (J.A. 19, 90):

"When we made the joint, Nichols was on the ground. The joint was made, and as the slack ran out, I released the brake. I surmised Mr. Nichols had already checked the car. It is the rule for the field man to check the car for safety, whether it be one car or ninety cars you have to rely on him. When I heard the noise, I yelled at Mr. Nichols, being in no position to give a stop sign."

erated the engineer and fireman. There consequently is no rational basis in the evidence for the conclusion reached by the Board of Appeals and Review. How the Board could say that because appellant surmised that Mr. Nichols had already checked the car, he implicitly admitted his violation of Rule 801 is beyond comprehension. The Seattle Regional Office was right and the Board is wrong.[19]

CONCLUSION

This clearly is a case where the action of the Alaska Railroad in assessing demerits against appellant was arbitrary and capricious. The Operating Rule on which it relies is vague and indefinite and cannot support the disciplinary action taken here. Moreover, even giving to Rule 801 the meaning now ascribed to it by respondents, there is no evidence of substance to support the action of the railroad and there is no rational basis in the evidence for the conclusions of the Board of Appeals and Review of the Civil Service Commission.

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[19] In a footnote in their brief below, respondents relied for the first time on a statement in a letter from appellant to the Seattle Regional Office in which he wrote:

> "If the management of the Alaska Railroad wants to hold the brakeman *equally* responsible with the conductor we should receive *equal* compensation for this added responsibility. I do however concede that the entire three man crew should be responsible, but not *equally* so, as the management contends." (J.A. 94).

Examination of the entire letter makes clear that appellant was not conceding any individual violation by him of Rule 801.

Appellant stated:

> "I contend it was unjust for me to receive any demerits in this particular case. I believe I was given these additional demerits solely on my previous record and that this was a convenient way for the management of the Alaska Railroad to get rid of me, by giving thirty (30) demerits to the entire crew then reducing them by fifteen (15) knowing full well I couldn't even stand even five (5) demerits." (J.A. 96).

The decision of the Regional Office of the Civil Service Commission was correct and should be reinstated. This Court should issue a mandate to the lower court along the lines of the mandate in *Weinberg* v. *Macy*, 124 App. D.C. 364, 369 F.2d 897.

Respectfully submitted.

KEITH L. SEEGMILLER

ISADORE G. ALK

Attorneys for Appellant
1725 Eye Street, N.W.
Washington, D. C. 20006

SUPPLEMENT

Title 5 U.S.C., Section 863, as amended (Act of June 27, 1944, 58 Stat. 387, as amended by Public Law 80-325, approved August 4, 1947).*

> No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days advance writen notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accord-

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* Public Law 89-554, approved September 6, 1966 (80 Stat. 378) codified the general and permanent laws relating to the organization of the United States and to its civilian offices and employees. The provisions of Section 863 have been incorporated into 5 U.S.C. § 7512 and 7701.

ance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: *Provided further*, That the Civil Service Commission may declare any such preference eligible who may have been dismissed or furloughed without pay to be eligible for the provisions of section 15 hereof.

JOINT APPENDIX

INDEX TO JOINT APPENDIX

CIVIL DOCKET

United States District Court for the District of Columbia

DATE		PROCEEDINGS
1966		
		Deposit for cost by
Jun.	10	Complaint, appearance filed
Jun.	10	Summons, copies (6) and copies (6) of Complaint issued Deft ser 6/14/66; AG ser 6/15, DA ser 6/13
Aug.	15	Answer of defts to complaint; c/m 8/15/66; Appearance David G. Bress, Nathan Dodell. filed
Aug.	15	Calendared (AC/N) (N)
Sept.	20	Motion of pltf for summary judgment; attachments; A, B & C; ser/ack 9/20/66; M.C. 9/20/66. filed
Sept.	21	Stipulation extending to and including 10/31/66 time for defts to answer pltfs motion for summary judgment. filed
Oct.	27	Stipulation extending time for defendants to answer motion of plaintiff for summary judgment to and including 11-21-66. filed
Nov.	18	Stipulation extending to and including 12/1/66 time for defendants to answer plaintiff's motion for summary judgment. filed
Dec.	1	Cross-motion of defendant for summary judgment; opposition to plaintiff's motion for summary judgment; c/m 12/1/66; statement; points and authorities; exhibits B, C and A; M.C. 12/1/66. filed

DATE		PROCEEDINGS
1966		
Dec.	7	Opposition of plaintiff to defendants cross motion for summary judgment; statement; ser. ack. 12/7/66; affidavit. filed
Dec.	14	Responses of defts. to pltff.'s statement of material facts and to additional statement of material facts as to which there is no genuine issue; c/m 12-14-66. filed
Dec.	23	Notice of filing exhibit; c/m 12/22/66; exhibit. filed
1967		
Jan.	25	Order denying pltff.'s motion for summary judgment, granting defts.' motion for summary judgment and dismissing action. (N) Matthews, J.
.....		
Mar.	20	Notice of appeal of pltff.; deposit by Seegmiller $5.00. (Copy mailed to U. S. Attorney) filed

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1521—'66

Filed June 10, 1966
Robert M. Stearns, Clerk

ROBERT W. FREEMAN,
2508 Fairbanks Street, Spenard, Alaska,
Plaintiff,

v.

STEWART L. UDALL,
Secretary of the Interior,

and

JOHN W. MACY, JR., L. J. ANDOLSEK,
ROBERT E. HAMPTON,
Commissioners, United States Civil Service Commission,
Defendants.

COMPLAINT FOR RESTORATION OF EMPLOYMENT

1. The matter in controversy exceeds the value of $10,000 exclusive of interests and costs. This Court has jurisdiction under the provisions of Title 11, Sections 305-6, District of Columbia Code and Sections 1331-1332 of Title 28 of the United States Code.

2. The plaintiff is a citizen and resident of the State of Alaska and a veteran entitled to all protection of the Veterans Preference Act of 1944, as amended. (Title 5 U.S.C. § 851 et seq.).

3. The defendant, Stewart L. Udall, is the Secretary of the Interior of the United States and is sued in that

capacity. Pursuant to the provisions of Title 5 U.S.C. § 485, he is charged with the supervision of the public business relating to the Alaska Railroad, a railroad owned and operated by the United States pursuant to the Act of March 12, 1914, c. 37, 38 Stat. 305, as amended, 48 U.S.C. § 301. Under Executive Order No. 11107 of April 26, 1963 (28 Fed. Reg. 4225), the Secretary of the Interior is authorized to operate the Alaska Railroad in all respects and all intents and purposes as if the operation thereof had been placed by law under his jurisdiction.

4. The defendants, John W. Macy, Jr., L. J. Andolsek and Robert E. Hampton, are Commissioners of the United States Civil Service Commission and are sued in that capacity.

5. On and prior to November 29, 1963 and for a period of over three years prior thereto, plaintiff was an employee of the Alaska Railroad. On said date, he was serving as a career conditional employee and was employeed as a brakeman at Anchorage, Alaska, at a salary of $153.25 per week.

6. Under the regulations of the Alaska Railroad, a demerit system was in effect which provided for the entry of demerits against the records of an employee. The regulations prescribed that when an employee's demerits accumulated to the number of 90, he would be dismissed from service.

7. On or about the 25th day of October, 1963, the management of the Alaska Railroad arbitrarily, discriminatorily, and without cause entered thirty demerits (later reduced to fifteen) against the record of plaintiff. The entry of the demerits purportedly was for violation of Rule 801 of the Alaska Railroad Regulations relating to Train or Yard Service. The entry of the demerits resulted in an accumulation of demerits against the record of plaintiff in excess of 90. Thereafter, on October 29, 1963, plaintiff was notified by the Alaska Railroad that

by reason of the accumulation of 90 demerits, he would be separated from service on the 29th day of November, 1963. Under date of December 31, 1963, a decision sustaining the removal action, effective November 29, 1963 was mailed to and received by plaintiff.

8. Plaintiff duly appealed from this decision to the Seattle Regional Office of the Civil Service Commission. That office on March 20, 1964, issued a decision finding that there had been no violation by plaintiff of Rule 801; that the October, 1963 assessment of demerits was in error and improper; and directing that plaintiff be reinstated to his former position retroactive to the date of discharge. On appeal by the Alaska Railroad, the Board of Appeals and Review reversed the decision of the Seattle Regional Office and sustained the action of the Alaska Railroad in assessing the demerits and discharging the plaintiff. An appeal from this action was taken by the plaintiff to the Commissioners of the Civil Service Commission who sustained the decision of the Board of Appeals and Review. Plaintiff has exhausted all of his administrative remedies.

9. The October, 1963, entry of demerits against the record of plaintiff was arbitrary and capricious for the reason that there was no basis for any finding that plaintiff had violated Rule 801 of the Alaska Railroad Operating Rules. In entering the demerits against the record of the plaintiff, the Alaska Railroad applied Rule 801 discriminatorily against the plaintiff. The discharge of plaintiff was improper and without cause and was in violation of plaintiff's rights as a veteran and career conditional employee of the Alaska Railroad. The determination of the Commissioners of the Civil Service Commission sustaining the action of the Alaska Railroad is based upon an erroneous, arbitrary, discriminatory and capricious construction of Rule 801 of the Alaska Railroad Operating Rules and is not supported by any evidence.

10. Plaintiff is ready, able and willing to resume his duties as a brakeman with the Alaska Railroad.

WHEREFORE, plaintiff prays:

1. That an order be entered declaring as null and void and of no legal effect the October, 1963, entry of demerits against the record of plaintiff; setting aside and nullifying the action of the Alaska Railroad in terminating plaintiff's service as of November 29, 1963; and setting aside all decisions of the United States Civil Service Commission affirming, or in any way sustaining, the said action of the Alaska Railroad dismissing plaintiff from its service.

2. That a further order be entered herein directing the defendant, Stewart L. Udall, to take or cause to be taken appropriate action to restore the plaintiff to his position as brakeman with the Alaska Railroad, retroactive to November 29, 1963, with all the earnings and arbitraries attaching to that position.

3. And for such other and further relief as the Court may deem proper.

* * * *

Filed August 15, 1966
Robert M. Stearns, Clerk

[Caption Omitted]

ANSWER

Defendants by their attorney, the United States Attorney for the District of Columbia, answer the complaint as follows:

First Defense

The complaint fails to join as a defendant the United States of America, an indispensable party.

Second Defense

The Court lacks jurisdiction over the subject matter of the complaint.

Third Defense

Defendants further answer the complaint, on the basis of the certified Civil Service Commission administrative records, as follows:

1. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation as to the amount in controversy. Deny that this Court has jurisdiction over the subject matter of the complaint. Alternatively, if there is any jurisdiction in this Court over the subject matter of the complaint, admit only that such jurisdiction is to conduct judicial review (on the basis of the certified administrative records) of the personnel action taken in plaintiff's case, to determine whether it conformed to the governing law and regulations.

2.-6. Admit the allegations of paragraphs 2 through 6 of the complaint.

7. Deny the allegations of paragraph 7 of the complaint, except that defendants admit that, on or about October 25, 1963, the management of the Alaska Railroad entered thirty demerits (later reduced to fifteen) against the record of plaintiff, for violation of Rule 801 of the Alaska Railroad Regulations relating to Train or Yard Service, which provides, in pertinent part, "Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety;" the entry of the demerits resulted in an accumulation of demerits against the record of plaintiff in excess of 90; that, by letter dated October 25, 1963, the Alaska Railroad notified plaintiff that it proposed to remove him from his position not earlier than thiry days from receipt of the notice; that plaintiff was notified of the decision to remove him on November 29, 1963, by letter dated November 27, 1963; that under letter dated December 31, 1963, a decision by the General Manager of the Alaska Railroad, sustaining the removal action, was mailed to and received by plaintiff. Affirmatively aver that the said entry of demerits against the record of plaintiff for violation of Rule 801 was sustained by materials in the Alaska Railroad's administrative record, which was subsequently submitted to the Civil Service Commission for appropriate review, in that the certified Civil Service Commission administrative records show that there is evidence in support of and a rational basis for the entry of said demerits.

8. Admit that plaintiff duly appealed the Alaska Railroad decision to the Seattle Regional Office of the Civil Service Commission. Admit that the Seattle Regional Office rendered a decision on March 20, 1964, but deny the description of that decision as stated. Admit that the Regional Office found "that the evidence relied upon by the agency in reaching a decision that the appellant was in violation of Rule 801 was insufficient and that the assessment of demerit against the appellant's record was in

error." Admit that the Regional Office directed that plaintiff be restored to his former position retroactive to date of discharge. Admit the allegations in the last three sentences of paragraph 8 of the complaint.

9. Deny the allegations contained in paragraph 9 of the complaint. Affirmatively aver that the certified Civil Service Commission administrative records fully sustain the decision of the Alaska Railroad, and the decisions of the Board of Appeals and Review and the Civil Service Commissioners, and show that there is a rational basis for the finding that plaintiff violated Rule 801 of the Alaska Railroad operating rules. Such records show that Rule 801 was not applied discriminatorily against plaintiff; and that plaintiff's discharge was not improper and was not without cause, but was in full accord with law.

10. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 10 of the complaint.

* * * *

[Caption Omitted]

Filed September 20, 1966
Robert M. Stearns, Clerk

MOTION FOR SUMMARY JUDGMENT

Plaintiff, Robert W. Freeman, by his attorneys, moves the Court for summary judgment in favor of the plaintiff and against the defendants for the relief demanded in the complaint, on the ground that there is no genuine issue as to any material fact and plaintiff is entitled to judgment in his favor as a matter of law.

In support of this motion, plaintiff submits the following:

Attachment A—Statement of Material Facts As to Which There Is No Genuine Issue

Attachment B—Letter from Office of the Secretary, Department of the Interior, dated September 1, 1965

Attachment C—Statement of Points and Authorities

* * * *

Attachment A to Motion for Summary Judgment

[Caption Omitted]

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

This Statement is based on the certified Civil Service Commission administrative records.

1. Plaintiff is a citizen and resident of the State of Alaska and a veteran entitled to all protection of the Veterans Preference Act of 1944, as amended (5 U.S.C. 851, et seq.).

2. Defendant, Steward L. Udall, is the Secretary of the Interior of the United States and is sued in that capacity. Pursuant to the provisions of Title 5 U.S.C. 485, he is charged with the supervision of the public business relating to the Alaska Railroad, a railroad owned and operated by the United States pursuant to the Act of March 12, 1914, c. 37, 38 Stat. 305, as amended, 48 U.S.C. 301. Under Executive Order No. 11107 of April 26, 1963 (20 Fed. Reg. 4225), the Secretary of the Interior is authorized to operate the Alaska Railroad in all respects and all intents and purposes as if the operation thereof had been placed by law under his jurisdiction.

3. The defendants, John W. Macy, Jr., L. J. Andolsek and Robert E. Hampton, are Commissioners of the United States Civil Service Commission and are sued in that capacity.

4. On November 29, 1963 and for a period of over three years prior thereto, plaintiff was an employee of the Alaska Railroad. On said date, he was serving as a career conditional employee and was employed as a brakeman at Anchorage, Alaska at a salary of $153.25 per week.

5. On the evening of October 3, 1963, the plaintiff was working as a "head" brakeman of a yard crew in the

yards of the Alaska Railroad at Anchorage, Alaska. The yard crew consisted of five men, namely:

Locomotive Engineman	—K. A. Fuller
Locomotive Fireman	—J. L. Strah
Conductor	—E. G. Ray
Field Brakeman	—J. C. Nichols
Head Brakeman	—R. W. Freeman

A yard crew performs switching operations within yard limits. The crew makes up trains, spots cars at sidings, and removes cars from sidings after unloading has been completed.

6. Under the Rules and Regulations of the Operations Department, the yard master has supervision over the yards and is responsible for conditions within yards. The Rules provide:

Yardmasters

840. Yardmasters have supervision over the yards and all persons employed therein must obey their instructions.

841. Yardmasters are responsible for conditions within yards. Trains and engines will be under the control of the yardmasters, and all employees in train; engine or yard service will be subject to their direction as to movements within yards.

842. Yardmasters are responsible for the proper distribution and placing of cars in the yards and for prompt movement of cars in and from the yards, in accordance with existing instructions.

7. The conductor is in charge of the yard crew. The Rules and Regulations Provide:

Movement Of Trains

106. The conductor and the engineer, and the pilot, if any, are responsible for the safety of the train and

the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection.

This does not relieve other employees of their responsibility under the rules.

Trainmen

850. The general direction and government of a train is in charge of the conductor and all persons employed on the train are subject to his instructions. Should there be any doubt as to authority or safety of proceeding, from any cause, he will consult the engineman who shall be equally responsible with him for the safety and proper handling of the train and for such use of signals and other precautions as the case may require.

Trainmen must be vigilant and cautious; must comply with the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations.

853. Conductors must assure themselves that their subordinates are competent and instruct them if necessary in the proper performance of their duties. Incompetence and disobedience will not be condoned.

Enginemen

921. When there is no conductor, or when the conductor is disabled, the engineman will, unless otherwise directed, have charge of the train and will be governed by the rules prescribed for conductors.

922. Firemen are subordinate to enginemen . . . The Engineman or fireman must not move the engine or any part of its machinery, unless he knows that it can be done without injury to anyone.

923. While switching, the engineman and fireman must both remain on the engine and give close attention to signals. Engine must be handled with care while making couplings.

928. Care must be used when backing to train or to take or leave cars.

9. The duties and responsibilities of brakemen are not specified by the Rules and Regulations. Under the *Definitions* in the Rules and Regulations, brakemen fall within the category of trainmen. The Rules and Regulations provide:

Adding Cars to Train

442. When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved.

Trainmen

855. Trainmen on duty, when not engaged elsewhere, must occupy the posts assigned to them.

10. The plaintiff was the junior member of the yard crew on the night in question and at the time of the accident giving rise to this proceeding, was acting as "head" brakeman. Ordinarily, he functioned as the "field" brakeman, but on that night, the "field" brakeman was J. C. Nichols. Mr. Nichols had passed the written and oral tests for the position of conductor and had worked as a conductor for a number of years for the Alaska Railroad. He was being used that night from the Conductors Extra Board and was being paid at conductors yard rate of compensation. As "field" brakeman, it was his primary responsibility to determine, in areas other than the immediate vicinity of the switch engine whether a car or cars could be moved with safety. As "head" brakeman, plaintiff's duties were primarily to work in the vicinity of the engine, coupling and uncoupling it to a car or cars.

11. On the night of October 3, 1963, the yard crew was instructed, by switch list given by their supervising yardmaster, to switch an empty box car standing on a siding alongside and to the west of the Air Van Lines Warehouse in the Anchorage yard. Unknown to the yard

crew, there was a thin steel platform extending from the warehouse to the box car on the engineer's side of the car. There was no warning light or other warning signal indicating the presence of the platform. At about 11:50 p.m., the switch engine was backed in a southerly direction towards the empty box car. The engineer and fireman were at their stations in the engine cab—the engineer to the left or east side facing the box car and the fireman on the west side. As the switch engine approached the box car, the conductor, Mr. Ray, was standing in about the center of a platform on the rear of the engine facing the box car; plaintiff was standing on the same platform to the left of the conductor; and Mr. Nichols, the "field" brakeman, was to the left of the plaintiff on the lower step of the platform and on the engineer's side of the engine. The night was dark. The headlight of the switch engine was on bright, shining in the direction of the box car. The conductor was aware of the positions occupied by the members of the crew.

12. The conductor described what then occurred as follows:

> ". . . when we coupled on the car, we had the headlight on bright, when we went in there and everything looked real good as far as pulling the car was concerned, after we coupled on the car, the brakeman, Mr. Freeman, knocked off the hand brake and I seen Mr. Nichols look back and he gave a signal to go ahead. Shortly after going ahead, I heard a noise and Nichols gave a stop sign and the engineer stopped immediately.
>
> * * * *
>
> Mr. Nichols was on the ground, although I am not positively sure. He was on the bottom step of the engine when we coupled on the car. I remember seeing him look back, although it was very dark that night.
>
> * * * *

Well, I have always made a point to look a track over before I pull it. The first thing you look for is, if there is anything under the wheels, then you look along the side of the cars . . . But when we went in with the headlight shining, we couldn't see nothing at that time. That platform is very small and then and as I say it was dark and just couldn't be seen."

13. The engineer, Mr. Fuller, testified that his headlights were on the box car and that he was watching the joint (i. e., the coupling). There was no obstruction on the building that obstructed his view between the engine and the car. He first became aware that something was wrong when he heard the noise. As soon as he heard the noise, he shut off immediately and Mr. Nichols simultaneously gave him a stop sign. The engine traveled not more than 3 or 4 feet.

14. Mr. Nichols testified that he had made the joint between the engine and the box car and that he was able to see between the car and the building. In explaining why he didn't see the platform, he stated:

"Well, we had the headlight shining from the engine on the box car and it makes it pretty hard to see from the bottom step. I was inspecting the pins and I glanced up and I could see all the way to the building. I never did see the platform. I just gave a go ahead and as soon as I heard the nise I gave him a stop. I always glance down the track to see if it is clear or not and it looked clear to me. I, of course, just took a physical and my eyesight is in need of glasses. I found that out yesterday."

15. Plaintiff was absent during the conductor's testimony. After his arrival, the conductor was asked whether the plaintiff would be able to give any testimony pertinent to any of the matters gone into. The conductor stated:

"Mr. Freeman took the hand brake off the car and got back on the engine. He stood from the back engine platform and leaned over the railing of the en-

> gine and knocked it off. I was standing in the middle and Nichols was on the lower step of the platform."

The plaintiff confirmed that he was not on the ground and that what the conductor had stated was true.

16. The accident caused some damage, estimated at $1,000 to a warehouse and box car. After the accident, the entire crew was charged by the Alaska Railroad with violation of Rule 801 of the Rules of the Operations Department. This rule is the first rule under the heading: *Train or Yard Service.* In pertinent part is provides as follows:

> "Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety."

17. On the basis of the evidence set forth above, the Superintendent of Transportation absolved the engineer and fireman of responsibility, but determined that each one of the other three was equally guilty of a violation of Rule 801 and directed that 30 demerits be assessed against the records of each one of the three—the conductor, the field brakeman and the plaintiff.

18. Under the Regulations of the Alaska Railroad, a demerit system was in effect which provided for the entry of demerits against the records of an employee. The regulations prescribed that no discipline by record would be made for less than 5 or more than 60 demerits. It was further provided that when an employee's demerits accumulated to the number of 90, he would be dismissed from service.

19. Previous to October 3, 1963, plaintiff's record had been assessed a total of 85 demerits. None of these demerits had been assessed for violation of any rules governing movement of equipment or because of accidents.

20. On October 25, 1963, the Superintendent of Transportation, by letter, notified the plaintiff of the assess-

ment of the 30 demerits. He also notified the plaintiff that the entry of these demerits gave him a total of 115 demerits and that he therefore proposed to separate the plaintiff from the service of the railroad not earlier than 30 days from the date of the receipt of the letter.

21. Plaintiff made a verbal appeal on November 4, 1963, and his testimony was taken. He testified as follows:

> Q. The particular case, Mr. Freeman, concerning the incident that occurred, when moving the car from the Air Van Lines Warehouse, all 3 of the trainmen were together in a position to determine if this car could be moved with safety and this was not accomplished and subsequently the car was moved and damage to the warehouse resulted?
>
> A. That is true, that is very true, but in the same instance we came in there with a light engine tied on to her and when a man jumps on the ground and gives a go ahead and if the engineer takes it, what is the rest of us going to do. If the man says go ahead, I'd take it, if he gave a sign go ahead then he is taking the responsibility and you are throwing it on the whole crew. We are not going to say to each other, let's all walk around the car.
>
> What am I going to do when I am standing in the middle and reach up and release the hand brake, by this time, it is still spinning, we are going back with her, within just a few second, now what am I going to do?
>
> * * * *
>
> Q. But you were in a position with the foreman and other brakeman at the time the car was picked up and an inspection was not made by yourself or the other two men sufficiently to determine if the car could be moved with safety?
>
> A. On this particular job, the 10:00 o'clock job, I usually played the field. I never went in there without checking when I am playing the field regardless.

Now Mr. Nichols was off the extra board and he is a good brakeman and a fast brakeman and we couldn't see the plate. There is a light that you can look right straight on through there, but evidently that plate was only about that thin (indicates with his fingers) and the door was completely down and evidently must have been pulled out far enough where you could not see it. I know I couldn't see it. I didn't even look. I am playing the pin, it is my job to release the brake and we are all standing on the engine. Nichols on my left. Well as a rule, when I was field man I will walk around.

Assuming the joint was made, I reached up to get the brake and by the time I am back down, my foot is still up, but I am in a safe position, the wheels is still spinning and there is nothing I can do. Now I am in the middle, Ed Ray to my right, Nichols to my left and we are already or have started to move and we didn't move over well, 2 or 3 feet at the very most, or we really would have done some damages.

* * * *

I agree that an inspection should have been made whole heartedly. We should have went back to see, but it is not up to the pin man to go up there because if he done that every night, you couldn't get nothing done. It would be an impossibility, you would be in the wrong place every time.

22. On November 27, 1963, the Superintendent of Transportation notified the plaintiff by letter of his decision to remove the plaintiff from service effective November 29, 1963.

23. Plaintiff, by letter dated December 6, 1963, appealed to the General Manager. In his letter of appeal he stated:

"When we made the joint, Nichols was on the ground. The joint was made, and as the slack ran out, I released the brake. I surmised Mr. Nichols had already checked the car. It is the rule for the

field man to check the car for safety in movement, whether it be one car or ninety cars you have to rely on him. When I heard the noise, I yelled at Mr. Nichols, being in no position to give a stop sign."

* * * *

"I don't understand the number of demerits assessed for this particular incident. I do not think I should have gotten any."

23. Under letter dated December 11, 1963, the General Manager sustained the removal action. The letter recited *inter alia:*

"If your accrual of demerits was of smaller proportion, your case would be susceptible of further consideration because of your position that the number of demerits awarded you was excessive. However, prior to the hearing of October 11, 1963, you already had accumulated a total of 85 demerits. Consequently, even though the award of demerits, was reduced from thirty to ten, or for that matter even to five demerits, the net results would remain unchanged."

"This office, therefore, sustains the decision contained in Mr. Davidson's letter of November 27, 1963."

24. Plaintiff duly appealed from this decision to the Seattle Regional Office of the Civil Service Commission. In his request for review he stated *inter alia:*

"I contend that this action against me to be most unjust inasmuch as my duties are primarily that of working in the vicinity of the locomotive, coupling and uncoupling it to a car or cars, and further that it is the duty of the field man and the responsibility of the conductor (swith foreman) in areas other than the immediate vicinity of the locomotive to determine whether a car, or cars are safe to move . . . ."

* * * *

"Upon coupling the locomotive to the car # 10353, I immediately started to release the hand brake. At that time it was the field brakeman who gave the engineer the signal to proceed. I was not in any way responsible for the primary movement of this car . . ."

25. In responding to the allegations made by plaintiff, the Alaska Railroad did not controvert the allegations of fact, but claimed:

"The three members of the crew were equally responsible for the damage incurred to the car and warehouse because none of the three assured himself the car was safe to move."

* * * *

"In the instant case, Mr. Freeman was equally responsible, under Rule 801, with the other train crew members for the movement and damage incurred, for, as previously described, the three crewmen on the open platform of the locomotive approached the box car and moved same without assuring themselves, collectively or individually, that it was safe to move."

26. In a rebuttal statement, plaintiff stated:

"I could not have had time to get on the ground, event if I desired to inspect the car, and at the same time release the hand brake from the car, before the signal to proceed was given to the engineer. Everything happened so quickly, and I wasn't in a position to view the side of the car at all, as it was my duty to see that the hand brake was released and this I did."

27. A supporting statement by Mr. Ray, the conductor was filed. He state, *inter alia:*

"I would like to mention that brakeman Freeman and myself were standing on the back platform of the engine at the time it coupled onto Car # 10353 at the Air Van Lines Warehouse. At this time Mr.

Freeman reached up to knock off any hand brake that the box car may have, before moving it. He did not at any time get onto the ground, before moving this car. Of course he did not know, and could not see around the car from this point of view."

"Mr. J. C. Nichols stated at the hearing that he did get onto the ground when the engine coupled onto the car and before it was moved."

"Having been a brakeman or conductor continuously since 1940 I can state that the assessing of the above demerits to Mr. Freeman was uncalled for."

28. At the request of the Appeals Examiner, the plaintiff submitted certain diagrams and accompanying explations. In answer to the questions: What position were you in after the engine had been coupled to the freight car? Where were other members of the crew?, plaintiff stated:

"I was on the rear top platform of the engine and reached to release the hand brake, the conductor remained in the same position. The field brakeman stepped onto the ground and gave signal to engine to proceed."

29. After the appeal was taken, the General Manager of the Alaska Railroad—as the result of an appeal to him by the General Chairman, Brotherhood of Railway Trainmen, on behalf of the conductor, Mr. Ray—by letter dated January 14, 1964, notified the plaintiff as follows:

"I have reviewed the entire file in the case and, although I feel there was equal responsibility among the crew members, I have agreed with Mr. Shake to adjust the discipline assessed from 30 demerits to 15 for each member of the train crew."

"Although this adjustment reduces your total accumulation of 115 demerits to 100 demerits, it has no effect upon your separation from service of The Alaska Railroad inasmuch as the total accumulation

is in excess of the 90 demerits specified in General Circular No. 11 dated January 1, 1959."

30. The Seattle Regional Office of the Civil Service Commission rendered a decision on March 20, 1964. In its decision it stated:

> "The appellant has not raised any question with respect to the assessment of demerits on previous allegations of violations of Rule 701. This office has concluded therefore, that the only issue involved is whether or not the appellant did or did not violate Rule 801 on October 3, 1963. More specifically, the question is whether the appellant has been properly charged with violating that portion of Rule 801 which reads, 'Before moving cars or engines in a street, or on a station or yard tracks, it must be known that the cars can be moved with safety'."

It found:

> "In the light of testimony as to what the employees involved saw as they approached the freight car; the physical duties performed by Mr. Nichols and the appellant; in the absence of any evidence to establish a direct responsibility insofar as the appellant is concerned for the determination of physical conditions around the freight car; and in part upon the statements as to responsibility recited in Rules 841 and 850 this office finds that the evidence relied upon by the agency in reaching a decision that the appellant was in violation of Rule 801 is insufficient and that the assessment of demerits against the appellant's record was in error."

And it concluded:

> "In conclusion we find that the charge against the appellant in light of the evidence adduced has not been substantiated and the action in separating the appellant from his position was unwarranted. Action to restore the appellant to his former position retroactive to the day of his separation is directed.

31. On appeal by the Alaska Railroad, the Board of Appeals and Review of the Civil Service Commission reversed the decision of the Seattle Regional Office and sustained the action of the Alaska Railroad in assessing the demerits and discharging the plaintiff. The Board stated *inter alia:*

> "Concerning the clarity of Rule 801, the Board does not find such ambiguity therein as to justify a conclusion that the rule did not fix responsibility upon Mr. Freeman, as well as upon Messrs. Ray and Nichols, in the circumstances of the accident which took place on October 3, 1963 at Air Van Lines warehouse. The record shows that Mr. Freeman started releasing the hand brake on Car # 10353 immediately after the couping of the locomotive to the car and before Nichols had given the signal to move the car. Mr. Freeman's action in releasing the handbrake was not specifically directed by the conductor, and Mr. Freeman took that action without assuring himself that the car could be moved with safety. In this connection, Mr. Freeman's statement in his appeal to the Railroad's General Manager was, 'I surmised Mr. Nichols had already checked the car.' In the opinion of the Board, Mr. Freeman thus implicitly admitted his violation of Rule 801, and the fact that two other members of the same crew including the conductor, were also in violation of the same rule does not absolve Mr. Freeman of his responsibility."

32. An appeal from this action was taken by the plaintiff to the Commissioners of the Civil Service Commission who sustained the decision of Board of Appeals and Review. The Commissioners found "that the current representations raise no new issues and fail to demonstrate probable error in the previous decision of the Board of Appeals and Review."

33. Plaintiff has exhausted all of his administrative remedies.

Attachment B to Motion for Summary Judgment

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington, D.C. 20240

[SEAL] Sep. 1-1965

Dear Messrs. Lee and Wright:

This refers to your request that the letters of reprimand issued you by the Superintendent of Transportation of The Alaska Railroad on December 23, 1964, be rescinded and removed from your personnel files.

I have completed a review of the entire record in your case, including the transcript of the hearing, the comments contained in your letter of January 25, 1965, and the affidavits forwarded by Mr. Lee's letter of July 2, 1965.

It is my decision that the Superintendent's letter of December 23, 1964, shall be rescinded and removed from your personnel files, for the reasons which follow:

> The record in this case reveals a lack of understanding as to the effect of instructions, or lack of instruction, by the Yardmaster on the responsibility of individual crew members for determining that cars can be moved with safety under operating rule 801.
>
> Because of the lack of dates and other specific information which might be verified, the affidavits forwarded by Mr. Lee do not resolve the question of whether management has applied its rules, orders and penalties consistently and objectively over the years. However, at face value the statements provide an indication that similar accident cases may have occurred in the past without any disciplinary action being assessed. The Alaska Railroad has not denied the charges that similar accident cases brought no penalty assessments.

I am asking the General Manager to take appropriate steps to insure that the responsibilities of individual crew members, the Yardmaster, and others who may be involved in switching movements are clearly defined in writing, and understood by all affected employees.

Sincerely yours,

/s/ D. OTIS BEASLEY
Assistant Secretary for
Administration

Mr. Robert J. Lee
Mr. James E. Wright
3100 Eide Drive
Anchorage, Alaska

[Caption Omitted]

Filed Dec. 1, 1966
Robert M. Stearns, Clerk

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Come now defendants, by their attorney, the United States Attorney for the District of Columbia, and move the Court for summary judgment on the ground that there is no genuine issue as to any material fact, and defendants are entitled to judgment as a matter of law. Defendants also oppose plaintiff's motion for summary judgment.

Incorporated herein and made a part hereof by attachment are:

Government Exhibit A, the relating certified Civil Service Commission records.

Government Exhibit B, Affidavit of Stewart L. Udall, Secretary of the Interior.

Government Exhibit C, Affidavit of John E. Manley.

In support hereof, defendants submit a statement of material facts and a memorandum of points and authorities.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ NATHAN DODELL
Assistant United States Attorney

[Caption Omitted]

DEFENDANTS' STATEMENT OF MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

This is a civil service employee discharge case. Judicial review in such cases is narrowly restricted in scope. The case involves solely questions for determination by the Court as a matter of law. No factual issues are presented for judicial trial outside the certified administrative records of the Civil Service Commission,[1] incorporated into defendants' motion for summary judgment.

While there are here no factual issues triable by the Court, we are—for the Court's convenience and in general conformity with Local Rule 9(h)—submitting the following as a "fair summary" of the material facts in the case as reflected in the certified Civil Service Commission administrative records.

The Material Facts

1. Plaintiff, a veteran, was employed as a brakeman by the Alaska Railroad, which is owned by the United States and operated by the Department of the Interior.

2. Under the regulations of the Alaska Railroad, a demerit system was in effect which provided for the entry of demerits against the records of an employee. The regulations prescribed that when an employee's demerits accumulated to the number of ninety (90), he would be dismissed from service. The policy includes provisions for cancellation of demerits on the basis of maintaining a clear record for at least six months.

3. Prior to October of 1963, plaintiff accumulated a total of eighty-five (85) demerits, for absence from duty

[1] Hereinafter referred to as "the Commission" or "CSC".

without proper leave and for failure to comply with instructions from proper authority. No questions have been raised with respect to these assessments of demerits.

4. The Alaska Railroad has promulgated a set of "Rules and Regulations of the Operations Department." Similar rules apply to the operation of a number of railroads.

5. The first sentence of the General Notice in the Rules and Regulations of the Operations Department is: "Safety is of the first importance in the discharge of duty."

6. Rule 801 of the Rules and Regulations of the Operations Department provides: . . . "Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety."

7. Before October of 1963, plaintiff had, on two occasions answered questions in the prescribed written examination for brakeman, to determine his knowledge of the operating rules of the Alaska Railroad. Questions involving Rule 801 were included in this examination.

8. On October 11, 1963, a hearing was held concerning an alleged violation of Rule 801 arising out of the following: On the evening of October 3, 1963, the plaintiff was working as a brakeman of a yard crew in the yards of the Alaska Railroad at Anchorage, Alaska. The yard crew consisted of five men, namely:

Locomotive Engineman	K. A. Fuller
Locomotive Fireman	J. L. Strah
Conductor	E. G. Ray
Brakeman	J. C. Nichols
Brakeman	R. W. Freeman

A yard crew performs switching operations within yard limits. The crew makes up trains, spots cars at sidings, and removes cars from sidings after unloading has been completed.

At 11:50 p.m. the crew backed a locomotive toward the Air Van Lines Warehouse in the yard, in order to couple to an empty box car on the siding beside the door of the warehouse. The locomotive was moving in a southerly direction, and the box car was to the west of the door of the warehouse.

The engineer and fireman were in the cab of the locomotive. The engineer was on the east side (the left side of the locomotive facing the box car) and the fireman on the west or right side. The conductor and the two brakeman were riding the back platform of the locomotive as it approached the box car. The conductor, Mr. Ray, was at the center of the platform; plaintiff standing on the same platform, was to the left of Mr. Ray; and Mr. Nichols, the other brakeman, was to the left of plaintiff on the lower step of the platform, on the engineer's side of the engine.

Unknown to the crew, there was a steel platform extending from the warehouse door to the box car door, on the engineer's side. There was no warning light or other warning signal indicating the presence of the platform. None of the crew saw the platform running from the car into the warehouse. No member of the crew walked to the opposite end of the box car.

Mr. Nichols made the joint (coupling) between the engine and the box car. After the joint was made, Mr. Nichols gave the signal to go ahead. Plaintiff had, in the meantime, released the handbrake of the box car.[2] Within a matter of moments Mr. Nichols gave the signal to stop and the platform, damaging the door, created some noise. The train travelled only a few feet.

The damage was estimated at $1,000.

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[2] Rule 442 provides: "When one or more cars are added to a train, trainmen must see that handbrakes are released before the cars are moved . . . ."

9. On October 25, 1963, W. C. Davidson, Superintendent of Transportation, The Alaska Railroad, issued to plaintiff a notice of assessment of thirty (30) demerits against him for violating Rule 801. The notice further informed plaintiff that it was proposed to remove him for accumulating demerits in excess of those allowable for retention in service, and provided an opportunity to reply.

10. The conductor and the other brakeman, as well as plaintiff, each were assessed thirty demerits for the incident. (This was reduced in each case to fifteen by letter of the General Manager of the Alaska Railroad, dated January 14, 1964.) The Fireman and Engineer were exonerated because the engine crew moves the engine upon signals received from the trainmen; and enginemen must remain in the cab of the locomotive in order to operate it and therefore were not physically in a position to examine the car from any position except the locomotive cab.

11. On November 4, 1963, plaintiff appeared personally before Superindent Davidson to reply to the notice of October 25, 1963.

12. By notice of November 27, 1963, plaintiff was removed from his position as brakeman effective November 29, 1963, for accumulating demerits in excess of the amount allowable for retention in service.

13. Plaintiff appealed the removal decision to the General Manager, The Alaska Railroad, who affirmed the decision of Superintendent Davidson.

14. Plaintiff appealed to the Seattle Regional Office of the Civil Service Commission. By its decision of March 20, 1964, the Regional Office reversed the Alaska Railroad decision and directed that the plaintiff be restored to his former position. This decision stated:

> "In light of the testimony as to what the employees saw as they approached the freight car; the physical duties performed by Mr. Nichols and the appellant;

in the absence of any evidence to establish a direct responsibility insofar as the appellant is concerned for the determination of physical conditions around the freight car; and in part upon the statements as to responsibility recited in Rules 841 and 850,[3] this office finds that the evidence relied upon by the agency in reaching a decision that [plaintiff] was in violation of Rule 801 is insufficient and that the assessment of demerits against [plaintiff's] record was in error.

Decision

In conclusion we find that the charge against the appellant in light of the evidence adduced has not been substantiated and the action in separating the appellant from his position was unwarranted. . . ."

15. On the appeal of the Alaska Railroad to the Board of Appeals and Review of the Civil Service Commission, the Board reversed the decision of the Seattle Regional Office and sustained the removal of the plaintiff. The Board of Appeals and Review stated:

"You [The Alaska Railroad] contend that the Seattle Regional Office erred in not finding Mr. Free-

---

[3] The Rules cited by the Seattle Regional Office are as follows:
841. Yardmasters are responsible for conditions within yards. Trains and engines will be under the control of the Yardmaster, and all employees in train, engine or yard service will be subject to their direction as to movements within yards.

Road crews of trains entering yards will be responsible for their respective trains and engines until yarded or until the Yardmasters or their representatives take charge.

850. The general direction and government of a train is in charge of the conductor and all persons employed on the train are subject to his instructions. Should there be any doubt as to authority or safety of proceeding, from any cause, he will consult the engineman who shall be equally responsible with him for the safety and proper handling of the train and for such use of signals and other precautions as the case may require.

Trainmen must be vigilant and cautious; must comply with the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations.

man to have violated Rule 801 and that any railroader knows Rule 801 applies to every member of the train crew who is in a position to know that a car can or cannot be moved with safety. You contend further that Conductor Ray and Brakeman Freeman and Nichols were each physically able to examine the conditions surrounding the switching of the car at the Air Van Lines warehouse on October 3, 1963, and that no one of them made the effort they were capable of making and which was necessary to know that the car could or could not be moved with safety. The requirements of Rule 801 in this instance were, you state, for the crew to get off the engine and walk not more than 50 feet round trip to make certain that the car could not be moved with safety. Thus it is your position that the conductor and each brakemen was guilty of violation of Rule 801 and that a brakeman cannot excuse his violation of a safety rule by the fact that the conductor in charge also violated it.

Mr. Parish, on the other hand, contends that Rule 801 is ambiguous and does not fix responsibility on any particular employee for any particular duty. Mr. Parish also contends that under the circumstances at the Air Van Lines warehouse on October 3, 1963, it was humanly impossible for Brakeman Freeman or Conductor Ray to walk the 25 feet to ascertain whether the car was safe to move because Brakeman Nichols had already given the proceed sign to the Engineer immediately upon coupling the engine to the car.

Concerning the clarity of Rule 801, the Board does not find such ambiguity therein as to justify a conclusion that the rule did not fix responsibility upon Mr. Freeman, as well as upon Messrs. Ray and Nichols, in the circumstances of the accident which took place on October 3, 1963, at Air Van Lines Warehouse. The record shows that Mr. Freeman started releasing the hand brake on car # 10353 im-

mediately after the coupling of the locomotive to the car and before Mr. Nichols had given the signal to move the car. Mr. Freeman's action releasing the hand brake was not specifically directed by the conductor, and Mr. Freeman took that action on his own initiative without assuring himself that the car could be moved with safety. In this connection, Mr. Freeman's statement in his appeal to the Railroad's General Manager was, 'I surmised Mr. Nichols had already checked the car.' In the opinion of the Board, Mr. Freeman thus implicitly admitted his violation of Rule 801, and the fact that two other members of the same crew including the conductor, were also in violation of the same rule does not absolve Mr. Freeman of his responsibility. Because Mr. Freeman had accumulated 85 demerits in the seven months preceding the accident at the Air Van Lines warehouse, because the minimum assessment of demerits is five, and because 90 demerits warrants dismissal under the Alaska Railroad's system of administering discipline, the Board concludes that Mr. Freeman's dismissal on charges of having accumulated demerits in excess of those allowable for retention in the service was for such cause as will promote the efficiency of the service.

In view of the foregoing, and as a result of its full review of the appellate record, the Board of Appeals and Review reverses the decision of March 20, 1964, by the Commission's Seattle Regional Office disapproving the discharge of Mr. Robert W. Freeman, and the action of the Alaska Railroad making his discharge effective November 29, 1963, is hereby sustained. Accordingly, the recommendation by the Seattle Regional Office for the retroactive restoration of Mr. Freeman is withdrawn.

16. By letter dated November 16, 1964, plaintiff requested the Civil Service Commissioners to reopen and reconsider the case. By letter dated July 15, 1965, plaintiff was notified that the Commissioners refused his request to reopen the case. The letted stated:

"As a result of this consideration of the matter, the Commissioners find that the current representations raise no new issues and fail to demonstrate probable error in the previous decision of the Board of Appeals and Review. Accordingly, the request for reopening the case of Mr. Freeman is denied, and the Board's decision of October 29, 1964, remains the Commission's final decision in the matter."

17. Thereafter, on June 10, 1966, plaintiff filed this action, seeking restoration to his position as brakeman retroactive to November 29, 1963, with back pay.

/s/ DAVID G. BRESS
United States Attorney

/s/ JOSEPH M. HANNON
Assistant United States Attorney

/s/ NATHAN DODELL
Assistant United States Attorney

Enclosure 1 to Government Exhibit A

Anchorage, Alaska
October 25, 1963

Registered Return Receipt
Requested

Memorandum

To: Mr. Robert W. Freeman, Brakeman, ID 47060

From: Supt. of Transportation

Subject: Notice of proposed removal from service

References: 48 USC 301, as amended, 5 USC 863

This will constitute notice to you that your record is being assessed thirty demerits as a result of the hearing held in the office of the Superintendent of Transportation of The Alaska Railroad on October 11, 1963 for violation of Rule 801, Rules of the Operating Department of The Alaska Railroad, when car 10353 was moved from the Air Van Lines warehouse on October 3, 1963.

In accordance with and under the procedures of General Circular No. 11, dated January 1, 1959, issued by the General Manager of The Alaska Railroad dealing with the issuance of demerits and manner in which such are removed from your personnel record, which also specifies that when a total of ninety demerits have been accumulated an employee will be dismissed from the service, you are hereby notified that the above assessment of thirty demerits gives you a total of 115 demerits to date.

This is notice that I, therefore, propose to separate you from the service of The Alaska Railroad, not earlier than 30 days from the date of your receipt of this letter. The charges against you have been founded on (1) evidence submitted at the following hearings, copies of which have been attached, and (2) accumulated demerits in excess of those allowable for retention in service.

1. Hearing held March 20, 1963 for your violation of Rule 701—absent from duty without proper leave. 30 demerits assessed.
2. Hearing held April 22, 1963 for your violation of Rule 701—absent from duty without proper leave and failure to comply with instructions from the proper authority. 30 demerits assessed.
3. Hearing held July 3, 1963 for your violation of Rule 701—absent from duty without proper leave. 25 demerits assessed.
4. Hearing held October 11, 1963 for your violation of Rule 801—not determining that cars can be moved with safety. 30 demerits assessed.

The facts developed in the hearings are basis for my proposal of removal, predicated on your disregard for compliance with instruction from the proper authority, absence from duty without proper leave, and carelessness in the performance of your duties.

You may answer these charges personally, in writing, or both if you prefer, within a reasonable time after receipt of this notice. You may submit evidence in support of your answer and will be allowed ten days from receipt of this letter to submit your answer. If ten days are not adequate for your reply, or if you do not understand my reasons for your proposed removal, I will extend the time necessary for your reply and explain further my reasons for this action. My telephone is extension 423, Room 219, General Office Building, Anchorage.

Full consideration will be given to your reply and supporting evidence why you should not be removed.

As soon as possible after your answer is received, or after the expiration of the ten day limit, if you do not answer, a written decision will be issued to you.

You will remain in your present active duty status at your present grade and salary until at least thirty days from the date of receipt of this letter.

/s/ W. C. Davidson
Supt. of Transportation

Attachments—4
cc: RLShake
RRMack
HLazelle
RHBruce
JEManley

Attachment to Enclosure 1 to Government Exhibit A

UNITED STATES
DEPARTMENT OF THE INTERIOR
THE ALASKA RAILROAD

Anchorage, Alaska

CONDUCTED BY:

Mr. W. R. Strong, Trainmaster

DATE:

October 11, 1963

TIME:

1:30 p.m.

THOSE PRESENT:

K. A. Fuller, ID 30542, Engineer
J. L. Strah, ID 41790, Fireman
E. G. Ray, ID 33836, Conductor
R. W. Freeman, ID 47060, Brakeman
J. C. Nichols, ID 30872, Brakeman
R. L. Shake (Representative)
D. O'Neil (Representative)
Lorraine L. Tidwell, Secretary

REASON FOR HEARING:

Alleged violation of Rule 801 of the Operating Rules, The Alaska Railroad which occurred at about 11:50 p.m., Thursday, October 3, 1963 when pulling car 10353 from Air Van Line Warehouse Anchorage and dragged a steel platform from between the building and car causing damage to warehouse door and building.

THE ALASKA RAILROAD
TRANSPORTATION

Anchorage, Alaska
October 14, 1963

WRS: We will open the hearing at 1:37 p.m.

This hearing is being held in the office of the Superintendent of Transportation for your alleged violation of that part of Rule 801 of The Alaska Railroad Operating Rules which states:

"Before moving cars or engines in a street or on station or yard tracks, it must be known that the cars can be moved with safety."

This alleged violation occurred at about 11:50 p.m., Thursday, October 3, 1963 when you were pulling Car 10353 from the Air Van Line Warehouse and dragged a steel platform from between the building and the car and caused considerable damage to the warehouse and building.

Have you been properly notified to appear for the hearing.

(Yes by all.)

WRS: Were you properly notified of the postponement?

(Yes by all.)

WRS: For the record, Mr. Freeman was properly notified of the postponement by telephone message and is aware of the fact of the time.

Do you gentlemen, have employees to represent you?

(Yes by all.)

EGR: Mr. Shake is representing the trainmen and Mr. O'Neil is representing the enginemen.

WRS: Mr. Ray what is your length of service with The Alaska Railroad?

EGR: June of '48.

WRS: Mr. Ray, approximately, how much of your service has been in yard and switching service?

EGR: Well, I'd say the majority of it.

WRS: Mr. Ray, at the time you went into Air Van Lines track after this car 10353, did you go in with a light engine?

EGR: Yes, we did.

WRS: Was the head light on in direction of movement?

EGR: Yes it was on bright.

WRS: Which side of the engine were you working on?

EGR: Well, we was all on the back platform, myself and 2 brakemen, when we went in to pull the car, I was I would say in the center of the engine, Freeman in the middle and Nichols was on the step, on the lower step.

WRS: On which side of the engine?

EGR: Nichols?

WRS: Yes.

EGR: On the engineer's side.

WRS: Was the platform between the car and warehouse on the engineer's side?

EGR: Yes, it was.

WRS: Was there a hand brake set on the car?

EGR: Yes there was.

WRS: Which end of the car?

EGR: Back on the engine's end of the car when we coupled on to it.

WRS: Did you use it in the movement of the car?

EGR: No sir.

WRS: Mr. Ray did either you or anyone of your brakeman walk to the far end of the car?

EGR: No sir.

WRS: Mr. Ray, did either you or either of your brakemen, by your direction, look around or under the car?

EGR: Well, I'll put it this way, when we coupled on the car, we had the head light on bright, when we went in there and everything looked real good as far as pulling the car was concerned, after we coupled on the car, the Brakeman, Mr. Freeman, knocked off the hand brake and I seen Nichols look back and he gave a signal to go ahead. Shortly after going ahead, I heard a noise and Nichols gave a stop sign and the engineer stopped immediately.

WRS: Mr. Ray, were you or either of your brakemen on the ground?

EGR: Nichols, I believe was on the ground, although I am not postively sure. He was on the bottom step of the engine when we coupled on the car. I remember seeing him look back, although it was very dark that night.

WRS: Mr. Ray, in your considerable switching experience have you ever had occasion to look around cars or under cars around warehouses in team areas for such obstructions as you found there?

EGR: Well, I have always made a point to look a track over before I pull it. The first thing you look for is, if there is anything under the wheels, then you look along the side of the cars. As far as looking under them, I have never looked under any cars, unless I knew something was expected to be there. But when we went in with the head light shining we couldn't see nothing at that time. That platform is very small and thin and as I say it was dark and just couldn't be seen.

WRS: Mr. Ray, did you know positively that car 10353 was the only car in that spur?

EGR: Yes, it was.

WRS: You knew that before hand?

EGR: I didn't know before hand, no. After the move was made we could see it was the only car in there.

WRS: What I am trying to ask you Mr. Ray, the point is, if there had been 2 cars in there, would you have come out with two cars?

EGR: Oh, no. There was only one car in there, as far as the headlight on the car was concerned.

WRS: Mr. Fuller, you were the engineer on the yard engine 7109 at the time the accident occurred?

KAF: Yes, I was.

WRS: Did you have any cars ahead of your engine?

KAF: No, we just had a light engine.

WRS: Did you at any time see any obstruction between the building and car?

KAF: Well . . . .

WRS: As you backed in there?

KAF: No sir.

WRS: Did you have a clear view from the engine to the back of the car?

KAF: No. My headlights was on the box car. I was watching the joint.

WRS: What I mean is, there was no obstruction on the building there that obstructed your view between the engine and car?

KAF: Oh no.

WRS: Mr. Fuller when did you first become aware there was something amiss?

KAF: Soon as I heard the noise that was made.

(Mr. Freeman enters the hearing room at 1:45 p.m.)

RWF: I am sorry I am late.

WRS: Mr. Fuller, approximately how far after you discovered the platform was being dragged, did it take you to stop?

KAF: Well, just as soon as I heard the noise, I shut off immediately and Mr. Nichols was giving me a stop sign at the same time. I wouldn't say we traveled over 3 or 4 feet.

WRS: Would you say that you heard the noise before you got the signal, before you got the signal from Nichols?

KAF: No, no I wouldn't.

WRS: Approximately at the same time? In other words, Mr. Nichols gave you that signal first?

KAF: Yes.

WRS: Mr. Nichols, did you make the joint between the engine and car 10353?

JCN: Yes, I did.

WRS: Were you able to see between the car and the building?

JCN: Yeh.

WRS: Can you say why you didn't see the platform?

JCN: Well, we had the headlight shining from the engine on the box car and it makes it pretty hard to see from the bottom step. I was inspecting the pins and I glanced up and I could see all the way to the building. I never did see the platform. I just gave a go ahead and as soon as I heard the noise I gave him a stop.

I always glance down the track to see if it is clear or not and it looked clear to me. I of course, just took a physical and my eyesight is in need of glasses. I found that out yesterday.

WRS: Mr. Ray, would Mr. Freeman be able to give any testimony pertinent to any of the things that have taken place so far?

EGR: I don't believe so.

WRS: Nothing to verify things we have mentioned already in the hearing?

EGR: Mr. Freeman took the hand brake off the car and got back on the engine. He stood from the back engine platform and leaned over the railing of the engine and knocked it off. I was standing in the middle and Nichols was on the lower step of the platform.

WRS: Mr. Freeman was not on the ground?

EGR: No.

RWF: I think his statement is true and complete.

WRS: Mr. Freeman, Mr. Ray has offered his statement of your actions, do you have anything to state in this regard?

RWF: That is true, what he just said, what Mr. Ray just said.

I would like to say something off the record.

(Off record discussion had.)

WRS: Back on the record, Now, Mr. Nichols.

JCN: What is the procedure these businesses follow in releasing these cars? What do they have to do before releasing them?

I haven't been able to find out from anybody. Do they just call up and say the car is released. I don't know if they check the car themselves or do they have a man check for them to make sure it is ready to go?

WRS: The procedure that is worked over in the freight house, is probably different each time. Sometimes they release it and sometimes it is automatically picked up.

JCN: The Special Agent seems to be of the opinion something is wrong. He says the company didn't release the car to the railroad and of course we couldn't find out who had released it. It was on our list.

I told Tiny to check it and Tiny said they had not called the railroad for 10 days prior to the accident.

We can get a copy of the switch list to ascertain if it was on there or not. They were not expecting the car to be pulled according to Tiny.

WRS: Do you have any questions Mr. Ray?

EGR: No questions. I'd like to make a closing statement when the time comes.

WRS: Does anybody have any questions?

RLS: Yes. I'd like to ask Mr. Ray if he does have a copy of the switch list?

EGR: No, I don't. I am sure the yard has one. It was the first car on the top of the switch list I had that night and as I remember it was the first move we made to go over in there. We went to the Industry first and this was the first move we made in this particular area.

JCN: We went to Texaco before Air Van Lines and down to the freight house for switching . . .

RLS: I have only this to say. Rule 801. It doesn't necessarily compel a switchman to walk clear around the car. The rule does say, cars will not be moved, unless it is known cars can be moved with safety.

When a light engine is coupled to a single car with the headlights shining full and the switchman is on the ground by the joint and can see between the building and the car, that there is no obstruction I would say it would fulfill the requirements of Rule 801.

I am told this particular ramp that damaged this building was the door. The door of this car was lodged under the door of the building. The door had been closed down on top of the platform and it is apparent from this, that either the Air Van Lines Company personnel themselves or else the freight house personnel that furnish the switch list was negligent in placing the number of this car on the switch list to be moved. That is all I have for the present.

WRS: Mr. Ray.

EGR: I was going to say practically the same thing as Bob. The only thing it was dark when we went in there and Nichols was right there, only 20 or 25 feet from the platform and I am sure if he could have seen, he never would have given a go ahead sign and he was right there when we made a hit and he gave a sign immediately to the engineer to stop and it is very evident, that somebody either of the freight house or Air Van Lines is negligent on this particular matter. If Air Van Lines released the car, surely they would have pulled the platform out of the car. So it looks like someone from the freight house had to release the car, without the knowledge of Air Van Lines, which indicates they more or less set a trap for us. I hate to use those terms, but it is what it is.

I don't see why we should be held responsible for someone else's carelessness. That is all I have to say.

WRS: Gentlemen has this hearing been held in a fair and impartial manner?

(Yes by everyone except Mr. Shake.)

RLS: That question cannot be properly answered until I have the opportunity to review the transcript.

WRS: Have any of you objected to my manner of questioning?

(The group answered no.)

WRS: We will close this hearing at 1:58 p.m.

* * * *

Enclosure 2 to Government Exhibit A

Anchorage, Alaska
November 27, 1963

Registered Return Receipt Requested

Memorandum

To: Mr. R. W. Freeman, Trainman, ID 47060

From: Supt. of Transportation

Subject: Separation from service with The Alaska Railroad

In my letter dated October 25, 1963 I informed you of the proposal to remove you from your position of brakeman, Transportation Branch of The Alaska Railroad.

I have given full consideration to the information contained in your verbal appeal in my office made on November 4, 1963, copy of such transcript of appeal attached to this letter.

The charges in my letter of October 25, 1963 are fully supported by the evidence and warrant your removal from service.

Your appeal stating demerits assessed concerning the moving of the car from Air Lines Warehouse were excessive is without foundation. The number of demerits assessed for this incident was justified. A reduction of such demerits would be of no benefit to you as a minimum of five (5) demerits would have been substantial to accumulate a total of ninety (90) demerits justifying your removal from service.

It is my decision therefore to remove you from service effective the conclusion of your shift on Friday, November 29, 1963.

You have a right to appeal this action to the General Manager of The Alaska Railroad or to the office of the Civil Service Commission, or first to the General Manager and then to the Civil Service Commission in accordance with the following:

If you first appeal to the Civil Service Commission you will have no right to appeal to The General Manager of The Alaska Railroad. In order for your appeal to be considered by the Commission, it must (a) be in writing, (b) set forth your reasons for contesting the removal, with such offer of proof and pertinent documents as you are able to submit, and (c) be submitted no later than 10 days after the effective date of your removal.

If you appeal first to the General Manager of The Alaska Railroad, you will not be entitled to appeal to the Commission until after a decision on your appeal to the General Manager is made. However, if no decision on the appeal has been made within 60 days after it was filed, you may elect to terminate your appeal to the General Manager by appealing to the Commission. An appeal to the General Manager should be directed to Mr. John E. Manley. It must (1) be in writing, (2) set forth the basis for your appeal, (3) state whether you desire a hearing in connection woth your appeal, and (4) be submitted no later than 10 days after the effective date of your removal. Mr. Russell R. Mack, Personnel Officer, will give you all available information about the appeals procedures should you desire to contact him.

/s/ W. C. Davidson
Supt. of Transportation

Attachment—Transcript
cc: JEManley
RLShake
RRMack
HLazelle

Attachment to Enclosure 2 to Government Exhibit A

THE ALASKA RAILROAD
TRANSPORTATION

Anchorage, Alaska
November 4, 1963

Transcript of proceedings held in the office of the Superintendent of Transportation, wherein Mr. Robert W. Freeman, Brakeman, ID 47060 offered testimony why he should not be removed from service with The Alaska Railroad.

* * * *

WCD: Let the record show, Mr. Freeman entered my office at 1:30 p.m. November 4, 1963 in reply to my letter of October 25, 1963 subject, proposed notice of removal from service.

I assume Mr. Freeman, you are here in response to that letter, is that correct?

RWF: Yes sir.

WCD: Do you have a presentation, a statement of facts concerning this matter?

RWF: Well, I think the last investigation for 30 demerits.

WCD: You mean, hearing don't you?

RWF: Yes, for the hearing the 30 demerits was a little stiff. On the side of every man of the crew. It was uncalled for that many demerits.

WCD: Well let me say this, I have not received any complaint from the other brakeman and conductor, who received the the same discipline you did.

RWF: They don't carry as many demerits as I carry either.

WCD: That is true.

RWF: I imagine you read the hearing?

WCD: Yes, I did.

RWF: Do you think it called for that stiff of punishment on behalf of all the crew?

WCD: Yes, I believe it did.

RWF: You must. I mean in the testimony the rest of the men don't agree with you completely. They haven't said anything and I haven't talked to any of them about what they think, I don't know, I haven't seen them, evidently they don't think it is right.

WCD: Do you have anything to offer . . .

RWF: Well . . . .

WCD: As to why the discipline should not be assessed?

RWF I don't think the whole crews should be, because, I remember a time, I think about a year or year and a half ago, that some cars got loose at Fort Richardson and came down to the yard and tore up the engine, a couple of caboose, one caboose and 3 tank cars, and the engineer and fireman were both hurt. I know the fireman was pretty beat up and a lot of men could have been killed. The foreman got fired and I think the rear brakeman got fired and the head brakeman was not even called in.

WCD: Well that particular incident you were not involved, were you?

RWF: No, but I am just saying the whole crew wasn't assessed for it.

WCD: The particular case, Mr. Freeman, concerning the incident that occurred, when moving the car from the Air Van Lines Warehouse, all 3 of the trainmen were there together in a position to determine if this car could be moved with safety and this was not accomplished and subsequently the car was moved and damage to the warehouse resulted?

RWF: That is true, that is very true, but in the same instance we come in there with a light engine tied on to her and when a man jumps on the ground and gives a go ahead and if the engineer takes it, what is the rest of us going to do. If the man says go ahead I'd take it, if he gave a sign go ahead then he is taking the responsibility and you are throwing it on the whole crew. We are not going to say to each other, let's all walk around the car.

What am I going to do when I am standing in the middle and reach up and release the hand brake, by this time, it is still spinning we are going back with her, within just a few seconds, now what am I going to do?

WCD: Mr. Freeman, did you make an inspection of the car to determine if the car could be moved with safety?

RWF: I didn't make an inspection of it.

WCD: That is why you were assessed 30 demerits.

RWF: I am not the foreman either.

WCD: But you were in position with the foreman and other brakeman at the time the car was picked up and an inspection was not made by yourself or the other 2 men sufficiently to determine if the car could be moved with safety.

RWF: On this particular job, the 10 o'clock job, I usually played the field. I have never went in there without checking when I am playing the field regardless. Now, Mr. Nichols was off the extra board and he is a good brakeman and he is a fast brakeman and we couldn't see the plate. There is a light that you can look right straight on through there, but evidently that plate was only about that thin (indicates with his fingers), and the door was completely down and evidently must have been pulled out far enough where you could not see it. I know I couldn't see it. I didn't even look I am playing the pin, it my job to release the brake and we are all standing on the engine. Nichols on my left. Well as a rule, when I was field man I will walk around.

Assuming the joint was made, I reached up to get the brake and by the time I am back down, my foot is still up, but I am in a safe position, the wheels is still spinning and there is nothing I can do. Now I am in the middle, Ed Ray to my right, Nichols to my left and we are already or have started to move and we didn't move over well, 2 or 3 feet at the very most, or we would have really have done some damage.

WCD: Well, I don't think I can make any other reply other than what I have made to you and there is no need to repeat it at this time.

Do you have anything else to offer, why you should not be removed from serve?

RWF: Well, I just think, I think it is too many demerits. I don't know if the whole crew got 30 demerits, the Conductor and . . .

WCD: The conductor and other brakeman and yourself each were assessed 30 demerits for this particular incident.

RWF: I still think its too many. I agree that an inspection should have been made wholeheartedly. We should have went back to see, but it is not up to the pin man to go up there because if he done that every night, you couldn't get nothing done. It would be an impossibility, you would be in the wrong place every time.

WCD: Mr. Freeman, have you anything else to state at this time?

RFW Nothing, I guess that is about it. I just think it's too many demerits.

WCD: Mr. Freeman, you are aware of the fact that your proposed removal from service is not based on this one issue of the 30 demerits, but it is based on a cumulation of demerits in accordance with General Circular No. 11, dated January 1, 1959 issued by the General Manager of The Alaska Railroad dealing with the issuance of demerits and manner in which such are removed from your personnel record.

RRM: I think Mr. Freeman is asking for consideration to review the excess demerits, if this has some basis. I think perhaps maybe we should review the issuance of demerits and just accept what he has offered as evidence, and if he has any other evidence asking us to consider the evaluation of demerits, because these 30 demerits make him susceptible for dismissal.

Mr. Freeman, Mr. Davidson, asked if you had any other facts that you would like to submit as to why you

should not be removed. If you have anything else to offer as to why you think these demerits are excessive?

RWF: I have never been assessed any demerits, as far as working in the yard or in train service. I have never had any demerits since I have worked here, never caused by any accidents. I done my job, my work with the trainmen and I think I done it fairly well, a decent job. I have tried to do my best. I haven't heard any complaints from the conductors I have worked with, that I know of and this work is tough in the winter time. I don't think you could find a tougher job, but I just like it and I like Alaska. I am just trying hard to do a good job.

WCD: Mr. Freeman, you are aware of the fact of how these other demerits issued to your personnel record occurred?

RWF: Yes, fully.

WCD: Have you anything further to state at this time?

RWF: Nothing whatsoever, Mr. Davidson, that is all.

WCD: I have nothing further to state and this situation will be reviewed and you will notified of my decision subsequently.

That is all.

(Proceedings closed at 1:45 p.m.)

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Enclosure 3 to Government Exhibit A

Manager, Branch Office
Eleventh U.S. Civil Service Region
U.S. Civil Service Commission
P.O. Box 199
Anchorage, Alaska 99501

Dear Sir,

I, Robert W. Freeman, residing at 2508 Fairbanks St. Spenard Alaska, request you to review an appeal I hereby make concerning a disciplinary action by the management of the Alaska Railroad which resulted in involuntary termination of employment for me by that agency effective Friday, November 29, 1963.

While switching in the Anchorage terminal yards at Air Van Line Warehouse I held the position of head brakeman on a switch crew consisting of a locomotive engineer, locomotive fireman, field brakeman, and conductor and head brakeman. An accident occured at the Air Van Lines warehouse in which the building sustained minor damage. A hearing was held by the Superintendent of Transportation and as a result the conductor and field brakeman and myself were given thirty (30) demerits.

It is the contention of management, that due to the accumulation of past rule violations of a different nature they would not allow me to be retained in the Federal Service. I was then subsequently separated.

1. I contend that this action against me to be most unjust, inasmuch as my duties are primarily that of working in the vicinity of the locomotive, coupling and uncoupling it to a car or cars, and further, that it is the duty of the field brakeman and the responsibility of the conductor (switch foreman) in areas other than the immediate vicinity of the locomotive to determine whether a car or cars are safe to move. The conductor on any railroad is primarily responsible to see that the work is performed and done in a safe manner.

2. I further contend that this actions is discriminating against me, inasmuch as the field brakeman and the conductor who is responsible, and also my immediate superior, were not terminated for the same rule violation, and further, that the past records of rule violations of the conductor and the field brakeman were not brought into focus such as mine were, which management considered in terminating me.

3. Upon coupling the locomotive to the car # 10353 I immediately started to release the hand brake, at that time it was the field brakeman who gave the engineer the signal to proceed. I was not in any way responsible for the primary movement of the car, yet I have been caused to suffer termination of my employement and the subsequent loss of my earnings.

4. Further, it was brought out at the hearing on October 11, 1963, that Air Van Lines had not released the box car 10353 for movement. It is the usual procedure for a car to be released before railroad switch crews pick them up, and also when a company such as Air Van Lines release a car they usually removed all their equipment such as the steel platform which cause the minor damage to the building and warehouse door. I further believe, if the Civil Service Commission check with Air Van Lines they will find that the damage to their company property to be insignificant and not such as to warrant my involuntary separation from the Federal Service. Your prompt consideration of this appeal will be deeply appreciated.

Very Truly Yours,

ROBERT W. FREEMAN

Enclosure 6 to Government Exhibit A

SEATTLE REGION
U. S. CIVIL SERVICE COMMISSION
FEDERAL OFFICE BUILDING
Seattle, Washington

March 20, 1964

APPEAL OF

ROBERT W. FREEMAN

under Subpart B of Part 752 of
the Civil Service Regulations

INTRODUCTION

On January 9, 1964, there was received in the office of the Director, Seattle Region Office, U. S. Civil Service Commission an undated and unsigned appeal from Robert W. Freeman. The appellant had been employed by the Alaska Railroad at Anchorage, Alaska. The appeal was from the action of that agency in separating him from his position as Brakeman (Yard) at $153.25 per week. The appellant is a veteran, has completed his probationary period and was serving as a career conditional employee. The appellant availed himself of his right of appeal under the provisions of Part 771 of the Commission's Regulations. A decision sustaining the removal action was issued under date of December 11, 1963. This letter was sent by registered mail and after being unsuccessful in delivering it returned by the Post Office to the agency on December 30, 1963. Under date of December 31, 1963, a copy of the decision was mailed and received by the appellant. It has been determined that the appeal comes within the purview of Part 752-B, Section 752.203 of the Commission's Regulations and that it was submitted on a timely basis. The appellant stated in writing under date of February 14, 1964, that he did not desire a personal hearing.

ANALYSIS AND FINDINGS

Under date of October 25, 1963, the appellant was notified in writing of the proposed adverse action. The charges against him were founded on evidence submitted at hearings held on March 20, 1963; April 22, 1963; July 2, 1963; and October 11, 1963. Copies of the hearings are attached to the file and labeled Exhibit 3, 4, 5, and 6 respectively. He was charged with an accumulation of demerits in excess of those allowable for retention in the service. General Circular No. 11, dated January 1, 1959 (Exhibit 7) specifies that when an employee accumulates a total of 90 demerits he will be dismissed. At the time the letter of charges was prepared the appellant had received a total of 115 demerits. The appellant was allowed ten days from the date of receipt of the letter of charges to reply personally and or in writing. Under date of November 4, 1963, the appellant replied orally to Mr. W. C. Davidson, Superintendent of Transportation. He was given the required thirty days advance notice and was retained in an active duty status with pay during the notice period. Prior to the incident of October 3, 1963, the appellant had accumulated 85 demerits. According to General Circular No. 11 (Exhibit 7) paragraph 6 provides that, "No discipline by record will be made for less than 5 or more than 60 demerits." It would, therefore, naturally follow that the appellant if found in violation of any rule would have a minimum of 5 demerits charged against him. This in turn would cause paragraph 5 which reads, "When an employee's demerits have accumulated to the number of 90, he will be dismissed from the service.", to become effective. This being the case, the finding on the part of management that the appellant was in violation of Rule 801 on October 3, 1963, was the basis upon which the removal action was effected. The appellant has not raised any question with respect to the assessment of demerits on previous allegations of violations of Rule 701. This office has concluded therefore, that the

only issue involved is whether or not the appellant did or did not violate Rule 801 on October 3, 1963. More specifically, the question is whether the appellant has been properly charged with violating that portion of Rule 801 which reads, "Before moving cars or engines in a street, or on a station or yard tracks, it must be known that the cars can be moved with safety."

A hearing was conducted on October 11, 1963 (Exhibit 6). At this hearing it was established that the crew of the switch engine consisted of K. A. Fuller, Engineer, J. L. Strah, Fireman, E. G. Ray, Conductor, J. C. Nichols, Brakeman and R. W. Freeman, Brakeman. Testimony was given establishing that the engine was backed in toward the Air Van Lines Warehouse, traveling south; that Mr. Fuller was in the cab on the Engineer's or right side of the engine; Mr. Strah was in the cab on the Fireman's or left side of the engine; Mr. Ray was standing in about the center of a platform on the rear of the engine, facing the freight car. Mr. Freeman was standing on the same platform immediately to the left of Mr. Ray. Mr. Nichols was on the bottom step of the engine on the engineer's or right side of the engine. The time was approximately 11:50 PM and the headlights were on. Mr. Nichols made the joint between the engine and the freight car. Mr. Nichols, Mr. Ray and Mr. Fuller all testified they could see between the car and the building which was on the engineer's side or left as the engine backed in. None of them saw the platform running from the car into the warehouse. After the coupling was made, Mr. Nichols gave the signal to go ahead. Mr. Freeman, had, in the meantime released the handbrake. Within a matter of moments Mr. Nichols gave the signal to stop and the platform damaging the warehouse door created some noise. The engineer testified the train hadn't traveled more than 3 or 4 feet. According to the transcript Mr. J. L. Strah, the Fireman did not testify.

On the basis of information developed at this hearing it was decided by management that the Conductor, Mr. Ray, the Brakeman, Mr. Nichols and the appellant were in violation of Rule 801. Each of these individuals had 30 demerits assessed against their record. On appeal to the General Manager the number of demerits was reduced to 15 each. The Fireman and the Engineer were absolved of any responsibility.

The Rules and Regulations of the Operations Department, The Alaska Railroad issued by the United States Department of the Interior were reviewed by this office. Rule 850 reads, "The general direction and government of a train is in charge of the conductor and all persons employed on the train are subject to his instruction. Should there be any doubt as to authority or safety of proceeding, from any cause, he will consult the engineman who shall be equally responsible with him for the safety and proper handling of the train and for such use of signals and other precautions as the case may require." Rule 841 reads in part, "Yardmasters are responsible for conditions within yards."

Evidence given at the hearing on October 11, 1963 (Exhibit 6) established that no one saw the platform as the engine approached the freight car. There was no apparent reason why the freight car could not be moved with safety.

In the light of testimony as to what the employees involved saw as they approached the freight car; the physical duties performed by Mr. Nichols and the appellant; in the absence of any evidence to establish a direct responsibility insofar as the appellant is concerned for the determination of physical conditions around the freight car; and in part upon the statements as to responsibility recited in Rules 841 and 850 this office finds that the evidence relied upon by the agency in reaching a decision that the appellant was in violation of Rule 801 is insuffi-

cient and that the assessment of demerits against the appellant's record was in error.

DECISION

In conclusion we find that the charge against the appellant in light of the evidence adduced has not been substantiated and the action in separating the appellant from his position was unwarranted. Action to restore the appellant to his former position retroactive to the day of his separation is directed.

NOTIFICATION OF FURTHER APPEAL RIGHT

This decision becomes the final decision of the Civil Service Commission unless further appealed by either the appellant or the employing agency to the Board of Appeals and Review, U. S. Civil Service Commission, Washington, D. C., within seven (7) calendar days after receipt of this decision. There is no further right to a hearing. If a further appeal is made, therefore, all arguments and evidence relating to the appeal must be in writing. A letter of appeal to the Board of Appeals and Review should be sent in duplicate with two copies of any documents it is desired that the Board consider in reviewing the appeal. This office should be informed of a further appeal so that the case file can be sent promptly to the Board.

For the Director:

/s/ J. J. Murray
J. J. MURRAY
Appeals Examiner

Enclosure 7 to Government Exhibit A

SEAL

UNITED STATES
DEPARTMENT OF THE INTERIOR
THE ALASKA RAILROAD
Washington 25, D. C.

Apr 29 1964

U. S. Civil Service Commission, Received Apr. 29, 1964
Board of Appeals & Review

Board of Appeals and Review
United States Civil Service Commission
Washington, D. C. 20415

Gentlemen:

• • • •

The Issue

There is only one issue in the Freeman case. The original decision by officials of the Railroad, the reversal of this decision by the Appeals Examiner in the Eleventh Region, and this management appeal to the Civil Service Commission, represent answers or attempts to find answers to one question—"Was Mr. Freeman guilty or not guilty of violating a safety rule of The Alaska Railroad?"

Procedural issues are not involved.

In his March 20 decision, Examiner Murray fairly stated this single issue as follows:

"This office has concluded, therefore, that the only issue involved is whether or not the appellant did or did not violate Rule 801 on October 3, 1963. More specifically, the question is whether the appellant has been properly charged with violating that portion of Rule 801 which reads 'Before moving cars or engines in a street, or on a station or yard tracks, it must be known that the cars can be moved with safety.'"

• • • •

The Facts

On the evening of October 3, 1963, Mr. Robert W. Freeman was working as a brakeman in a yard crew in the yards of The Alaska Railroad at Anchorage, Alaska. A yard crew normally consists of five men: an engineer and fireman, a conductor, and two brakemen. Such a crew performs switching operations within yard limits. Thus they are responsible for making up trains, for spotting cars at sidings, and for removing such cars from sidings after unloading has been completed.

At about 11:50 p.m. on October 3, 1963, the yard crew backed a locomotive toward the Air Van Lines Warehouse in the Anchorage yard in order to couple to an empty box car on the siding beside the door of the warehouse. The locomotive was traveling south; the engineer and fireman were in the cab of the locomotive; and the conductor and two brakemen, one of whom was Mr. Freeman, were riding the back platform of the locomotive as it approached the empty box car. Mr. Ray was the conductor and Mr. Nichols the second brakeman. Mr. Nochols, the second brakeman, made the joint between the engine and the freight car.

Unknown to the yard crew, there was a steel platform extending from the warehouse door to the freight car door. According to the Appeals Examiner for the Commission none of the crew "saw the platform running from the car into the warehouse. After the coupling was made, Mr. Nichols gave the signal to go ahead. Mr. Freeman had, in the meantime, released the handbrake. Within a matter of moments Mr. Nichols gave the signal to stop and the platform, damaging the door, created some noise. The engineer testified the train hadn't traveled more than 3 or 4 feet."

The amount of damage to the door of the warehouse and to the box car, as a result of the accident, was estimated at about $1,000.

Shortly after the accident appellant Freeman, as well as conductor Ray and brakeman Nichols, were charged by the Railroad with violation of Rule 801, previously quoted, in that they had failed to determine that the car could be moved safely before attempting to move it.

A hearing was held under Alaska Railroad rules on October 11, 1963. Management thereupon determined that appellant Freeman, conductor Ray, and brakeman Nichols were, each, separately and individually, guilty of a violation of Rule 801. Each was assessed 30 demerits (later reduced to 15) under the Railroad's system of assigning demerits as disciplinary punishment for rules infractions.

The Alaska Railroad's disciplinary system by demerit record is described in ARR General Circular No. 11 of January 1, 1959. Under the rules spelled out in this circular "When an employee's demerits have accumulated to the number of 90, he will be dismissed from the service."

As a result of prior rules infractions, for which he had been adjudged guilty after hearing, Mr. Freeman had accumulated 85 demerits. The 15 demerits assessed as a result of the disciplinary action following the accident on October 3, 1963, resulted in a number of demerits in excess of 90. Mr. Freeman was, accordingly, discharged after due notice. His appeal and the reversal of the Railroad's decision by Appeals Examiner Murray of the Eleventh Civil Service Commission Region followed.

The Argument

There are 115 pages of rules in the "Rules, Operating Department" which constitute the safety bible for Alaska Railroad Train and Enginemen. The operating and safety rules of The Alaska Railroad are not rules arbitrarily or capriciously promulgated by officials of The Alaska Railroad. They are based on a Consolidated Code of Operating rules. The same basic set of consolidated rules guard

the safety of passengers on the following railroads party to the consolidated code:

Chicago, Milwaukee, St. Paul and Pacific Railroad
Davenport, Rock Island and North Western Railway
Des Moines Union Railway Company
Duluth, South Shore and Atlantic Railroad Company
Great Northern Railway Company and affiliated lines
Minneapolis, and St. Louis Railway Company and affiliated lines
Minneapolis, St. Paul and Sault Ste. Marie Railroad Company
Minnesota Transfer Railway
St. Paul Union Depot Company
Northern Pacific Railway Company and affiliated lines
Spokane International Railroad Company
Spokane, Portland, Seattle Railway Company and affiliated lines
Union Pacific Railroad Company, Oregon Division

To a railroader brought up on these operating rules, there is something frighteningly casual in Examiner Murray's summation of his reasons for overruling the Railroad decision as to Mr. Freeman's alleged violation of one of them. The book of rules begins with the statement that "safety is of the first importance in the discharge of duty" and "obedience to the rules is essential to safety and is required." Examiner Murray's summation of the argument in the Freeman case, quoted below, should be read in the light of this Railroad emphasis on safety and in the light of the fact that Mr. Murray is dealing with a branch of railroading, that is, with yard service, where the death rate from on-duty accidents is higher than for commercial airline pilots. Here is Examiner Murray's summation:

"Evidence given at the hearing on October 11, 1963 (Exhibit 6) established that no one saw the platform as the engine approached the freight car. *There was no ap-*

parent reason why the freight car could not be moved with safety. (Underscoring supplied.)

"In the light of testimony as to what the employees involved saw as they approached the freight car; the physical duties performed by Mr. Nichols and the appellant; in the absence of any evidence to establish a direct responsibility insofar as the appellant is concerned for the determination of physical conditions around the freight car; and in part upon the statements as to responsibility recited in Rules 841 and 850 this office finds that the evidence relied upon by the agency in reaching a decision that the appellant was in violation of Rule 801 is insufficient and that the assessment of demerits against the appellant's record was in error."

Examiner Murray, in the above summation, supports his overruling of Railroad management in the Freeman case by three conclusions, or inferences, everyone of which is not only false but represents denial of the paramount importance of safety in railroad operations.

1. In the first paragraph he concluded that if "there was no apparent reason why the freight car could not be moved with safety", there was no further obligation on the part of any member of the yard crew to determine whether, in fact, the car could be moved with safety.

2. In the second paragraph he concluded that there was no evidence to establish that brakeman Freeman had any direct responsibility to determine "physical conditions around the freight car".

3. Also in the second paragraph Examiner Murray infers that where a yardmaster has authority over yard crews and yard conductor has authority over yard brakemen, brakeman Freeman has no independent responsibility for obeying safety rules, specifically Rule 801.

We are requesting Civil Service Commission Review and Appeals Board to sustain the Management of The

Alaska Railroad in its original decision that brakeman Freeman violated Rule 801, on the grounds that the three major premises, on the basis of which Examiner Murray reached his decision, are untrue.

Examiner Murray's first conclusion that, if it was apparently safe to move the car, the crew had no further obligation to check as to whether appearance and reality coincide, is demonstrated to be untrue by the language of Rule 801 itself. The Rule states "it must be known that the cars can be moved with safety." Examiner Murray, in effect, has altered this language to read that the car may be moved if "there was no apparent reason why the freight car could not be moved with safety".

Such a change in the language of the Rule represents a misinterpretation shocking to a railroader because such a misinterpretation invites the yard crew to be satisfied with a superficial check only. In fact Examiner Murray states that evidence at the hearing established that "no one saw the platform as the engine approached the freight car". Therefore, he concludes that "there was no apparent reason why the freight car could not be moved with safety."

But the Rule states that "it must be known that the cars can be moved with safety." The accident happened at about 11:30 at night in October, a time of year when at that hour it is completely dark in Anchorage. Vision alone, obviously could not be depended on. Yet Examiner Murray concluded that Rule 801 permitted the yard crew, in this instance, to ignore any danger that they could not see. This represents not only a reckless disregard of the language of the Rule but a reckless disregard of rather elementary requirements for safe operations in railroad yard service.

All Brakeman Freeman had to do was to walk 25 feet from the end of the freight car to the door of the ware-

house and he would have discovered that the freight car could not be moved with safety because the platform had not been removed from its position between the car and the warehouse. Conductor Ray in the investigation (page 3) acknowledges that he and the appellant never got off the engine and he is not sure that Brakeman Nichols got off the engine although, to quote Conductor Ray, "It was very dark that night". The three men involved were standing within 25 feet of the platform between the car and the building. They all had lanterns, and the platform was not small. Fortunately, only property damage occurred. Another time any man could be killed or maimed because of the same rules violation.

A man bereft of the senses of sight and hearing could readily have determined that the car could not be moved safely. He would simply have had to grope his way between the car and the building for the length of the car and he would have quickly found that he simply could not get through because of the bridge between the car and the building which had been left in place.

This point is well illustrated by the series of four pictures attached as Exhibit A. After the accident a freight car was spotted at the warehouse and the platform put in position exactly as when the accident happened. The four pictures were of course taken in the day time. They prove how little effort was necessary to know that the freight car could not be moved with safety.

Picture A-1 is particularly interesting in this respect. It shows the ladder at the end of the freight car on which Brakeman Freeman was standing when he released the hand brake by turning the wheel shown in the upper right hand corner of the picture. The platform is but a few feet away, between the warehouse and the car. Mr. Freeman did not see it and took a chance, which Rule 801 does not permit that no obstacle to safe movement existed.

Brakeman Nichols' testimony at the hearing is pertinent to this point. He was asked "Can you say why you didn't see the platform?" He replied "Well, we had the headlight shining from the engine on the box car and it makes it pretty hard to see from the bottom step . . ." Both the night and the headlight made vision difficult and, therefore, called for a more certain means of observing the rule that "it must be known that cars can be moved with safety."

The requirements of the Rule, in this instance were not excessive. They simply called for the crew to get off the engine and walk not more than 50 feet round trip to make certain that the car could not in fact be moved with safety. By the admission of the conductor at the hearing the crew did not even know whether they were pulling one car or more than one from the siding. Neither the conductor nor the brakeman took the normal precautions for the observance of Rule 801, and Examiner Murray had neither right nor authority to change the meaning of the rule in such a way that he could conclude that it was not violated by Brakeman Freeman.

The Examiners emphasis upon "apparent reason", if applied generally to railroads, would substantially increase the hazards of railroading. The Commission should understand that apparently trivial matters are subject to discipline under the operating rules because lack of attention to them can cause accidents and sometimes extremely serious accidents. Thus, train crews can be disciplined for failure to check watches daily with standard time clocks or for leaving a designated point a minute or two ahead of schedule.

An engineer cannot justify his derailment of a train at an open switch on the ground that visibility was such that he did not see the signal. A brakeman cannot justify failure to note an unsafe situation because the conductor did not notice it either.

A striking case in point is furnished by the Rule which requires that an employee, after throwing a switch, must go to the other side of the track from such switch and that, while awaiting an approaching train, must remain at least 150 feet away from such switch. Men have been severely disciplined for violating this rule even when no harm or accident occurred. Such discipline may seem unduly severe; however, some of the worst wrecks in railroad history prior to issuance of this rule have been caused by an employee throwing a switch and then remaining by the switch while the train passed over the switch. During such passage of the train and while the train was still going over the switch, some mental quirk has caused the trainman to doubt the correctness of his action and the switch has been thrown back to its original position under the train with loss of life and property.

The Civil Service Retirement system is paying annuities to the widows of several deceased Alaska Railroad employees who relied upon the "apparent reason" in a dangerous situation. If a safety engineer employed by The Alaska Railroad consistently expressed the safety philosophy of this aspect of the Commission's decision in the Freeman case, he would be discharged for cause. "Apparent" safety is not good enough in railroading. Employees must come as close to the realities of safety as it is humanly possible to do. They must exert every reasonable effort to make certain that the appearance and the reality are the same.

Examiner Murray's second point relates to his conclusion that there was no evidence to establish that brakeman Freeman had any direct responsibility to determine physical conditions around the car. Here again the wording of the Rule denies this inference. Obviously *someone* had a direct responsibility to examine the physical conditions around the car or Rule 801 might as well be removed from the book of operating rules. If the Rule

meant to exclude brakemen from this direct responsibility, such an important conclusion would have been expressly stated and not left to inference.

Actually, Rule 801 is the first rule in the book of operating rules that appears after the general head "Train or Yard Service". Conductors or brakemen, engineers or firemen are not mentioned. The terms used are "crews" or "employees". Any railroader knows that Rule 801 applies to every member of the crew who is in a position to know that a car can or cannot be moved with safety. In the instant case the engineer and fireman were exonerated because they must remain in the cab of the locomotive in order to operate it and were thus not in a position to examine physically a car from any position except the locomotive cab.

The conductor and the two brakemen, however, were physically able to examine the conditions surrounding the switching of the freight car. The locomotive had coupled to it. Before the signal was given to the engineer to move out with the car "it must be known that the car can be moved with safety." The car could not be moved with safety as the accident proved. Neither the conductor nor the two brakemen had made the effort they were capable of making and which was necessary in order to know that the car could or could not be moved with safety. Thus they were all judged guilty by Railroad management of violating Rule 801 and were awarded disciplinary demerits accordingly.

Examiner Murray's third proposition, carried to its logical conclusion, would place safety obligations upon supervisors only and would remove this obligation from rank and file employees. The operating rules do not make this distinction and the requirements of safe operation cannot possibly be met if such a distinction is made. This point is so obvious to railroaders that it would not occur to them that it was necessary to substantiate it. The

paramount importance of safety means that any railroad employee who is in a position to prevent an accident must make every reasonable effort to do so. The separate and individual safety responsibility of every member of a railroad team or crew is necessary to safe operations. As the degree of hazard increases so does the importance of this principle. It is not possible to operate trains safely without this separate and individual responsibility of all the employees concerned. When a safety rule applies to both the conductor and the brakemen (and Rule 801, by its language, clearly applies to both), the brakeman cannot excuse his violation of a rule by the fact that the conductor also violated it.

Even Mr. Freeman knows this to be true. In his letter of appeal to the General Manager (December 6, 1963), Mr. Freeman states that brakeman Nichols was responsible for checking the safety of movement. Rule 801, of course, makes no such distinction. But on the basis of the Examiner's reasoning neither brakeman was responsible.

Mr. Freeman took examinations on the book of rules in both 1960 and 1961. He answered questions on Rule 801 in both. In neither answer did he suggest that he thought only the conductor or only the conductor and the "field brakeman" were responsible for violations.

The General Chairman of the Brotherhood of Railroad Trainmen clearly does not agree with the interpretation of the Examiner. His letter of January 11, 1964, to the General Manager, reads as follows:

"Dear Mr. Manley:

"Reference is made to your letter of January 8, 1964 wherein you advise that you cannot agree that Conductor Ray was less reponsible, for damage to Air Van Lines warehouse, than the brakemen on the crew.

"You advise that you will, however, reduce the demerits for the entire crew on the basis that discipline assessed was too great for the offense. Please be advised that this committee accepts your decision and appreciates your consideration.

"It would be appreciated, by the undersigned, if these men could be advised in writing of the reduction of demerits and a copy of letter to me."

Very truly yours,

/s/ R. L. SHAKE

The Commission cannot uphold the reasoning and decision of Examiner Murray without concluding that a man who has never worked a day in train service knows more about the operating rules than a man who has spent a good part of a lifetime as a trainman and who, in disputes with management, is the legal representative of conductors and trainmen.

We have examined a number of cases of disciplinary action taken on private railroads which have been adjudicated under the Adjustment Board procedure of the Railway Labor Act. We do not find a single case which supports the rules interpretations of Examiner Murray. We find many cases which support The Alaska Railroad's view as to the interpretation of safety rules.

A summary of a number of National Railroad Adjustment Board cases dealing with safety violations is attached. Cases which seem particularly pertinent are marked with an "x". The full text of the most pertinent of these cases has been requested from the headquarters office of the National Railroad Adjustment Board in Chicago, and they will be filed with the Commission as soon as received.

These Adjustment Board cases show a far more meticulous regard for the importance of safety in railroad operations than is indicated by Examiner Murray's analysis and decision in the Freeman case.

Thus, in the decision in the case of the Firemen and Enginemen v. the Chicago and Northwestern Railway (Case No. 17047), the Adjustment Board said:

"Safety First is an unwritten rule on all American railroads. All formalized safety rules are subordinate to it. They only implement it. Every employee is presumed to know and obey the Safety First rule from the instant of his employment. Most disciplinary cases involving accidents are clearly covered by this unwritten Safety First rule. Our findings in such cases should not be affected by failure to cite a specific safety rule or even by the fact that there is no specific safety rule covering a particular accident."

A similar emphasis on safety is contained in the Adjustment Board decision in Case No. 16534:

"Rules for the safety of life and property in the railroad industry are essential. And proven diobedience of such rules, as in the instant case, is not to be regarded lightly. It is not properly within the judgment and discretion of employees like the claimant to determine when or where such rules are to be obeyed or disobeyed."

Examiner Murray's suggestion that Rule 801 was not violated because the movement of the freight car was apparently safe could not possibly have been found acceptable by the men who wrote the decisions in the Railroad Adjustment Board cases cited above.

Case 17518 represents a denial of the reasoning used by Examiner Murray in concluding that Brakeman Freeman had no responsibility to observe Rule 801. In the cited case the Adjustment Board said:

"Yard helper was assessed 45 demerits for responsibility in making a blind shove resulting in collision with a diesel yard engine. Having previously been debited with 45 demerits the new penalty made a total of 90 demerits which, under the system of discipline in effect on the property, required dismissal. . . . claimant . . . here seeks his reinstatement because of asserted customary practice and equal negligence of other employees in bringing about the accident. Neither can absolve claimant from blame. The penalty might seem severe but his fault being admitted, his record was properly considered and we cannot say that discharge was not justified."

Case 17193 represents a denial of Examiner Murray's conclusion that the authority of supervisors absolved Brakeman Freeman in this case from responsibility to observe Rule 801. In the above cited case the National Railroad Adjustment Board said:

"Where yard foreman (conductor) was assessed 30 demerits for failure to take proper precaution in moving two cars with excessive load dimensions with result that they failed to clear a hopper car and were damaged, claim for removal of discipline on basis that General Yardmaster should have given claimant more definite and emphatic warning in view of his instructions, was denied . . . his 37 years experience working in that yard must have taught him to know excessive load dimensions and dangers of clearance, yet he engaged in unnecessary switching of these cars and the very fact of the accident is proof of lack of proper precaution."

Finally we have a case almost exactly in line with the case of Brakeman Freeman and his failure to make sure that a freight car could be moved safely.

In Case No. 19206, the National Railroad Adjustment Board found that a brakeman was "suspended seven days for failure to fully check cars to be picked up at an in-

dustry with result, a ramp extending from one car became wedged causing damage to car and property. Claim for removal of discipline and pay for time lost, on basis others were responsible, denied. Claimant admits that, had he walked to the north end of this car, he could have seen the unloading ramp. His admitted non-observance of the rules compels a denial award.

In the Freeman case, Mr. Freeman, along with Conductor Ray and Brakeman Nichol, admitted that they did not walk around the car to find out whether an obstruction existed. It is obvious that, if they had, the platform would have been detected and the movement of the freight car would not have been made until the platform had been removed. This case demonstrates that the Adjustment Board regarded the responsibility to observe Rule 801 as extending beyond looking at what was immediately visible, that brakemen as well as supervisors have the responsibility for observing this safety rule and that a brakeman cannot avoid his own responsibility by alleging that other members of the crew were, in fact, responsible.

In summary, we ask that the Board of Review and Appeals sustain management's position in this case because the Examiner's decision is based upon conclusions and inference which are not only false, but detrimental to the promotion of safe practices and safety programs on The Alaska Railroad.

We would go further and state that if, through a decision against the Railroad, Alaska Railroad employees are encouraged to actions that are only "apparently" safe, and deaths or injuries result, the Civil Service Commission must take its share of the responsibility.

The Freeman case goes far beyond considerations of Mr. Freeman's personal situation. It extends to the heart of the safety program of The Alaska Railroad and of all railroads that have tried, through the operating rules, to

conduct inherently dangerous operations with maximum security to the lives and property of passengers. shippers and employees.

Sincerely yours,

/s/ John E. Manley
JOHN E. MANLEY
General Manager
The Alaska Railroad

Enclosures

Attachment to Enclosure 7 to Government Exhibit A

Award 17047
Docket 27907

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois
With Referee Daniel C. Rogers

PARTIES TO DISPUTE:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN

CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Statement of Claim: "Request that the 10 demerit marks placed against the record of Fireman J. H. Fellensick, Dakota Division, be removed and that he be paid for all time lost waiting for hearing relative to accident October 18, 1951."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

"Safety First" is an unwritten rule on all American railroads. All formalized safety rules are subordinate to it. They only implement it. Every employe is presumed to know and obey the "Safety First" rule from the instant of his employement. Most disciplinary cases involving accidents are clearly covered by this unwritten "Safety First" rule. Our findings in such cases should not be affected by failure to cite a specific safety rule or

even by the fact that there is no specific safety rule covering a particular accident.

Claimant, C&NW fireman, as well as the engineer who was disciplined, was responsible for his engine as it approached the steam engine standing at the coal chute. Independently of the duty of others, it was his individual duty to exercise the degree of care required to avoid the collision with the steam engine. The defenses he has offered do not excuse him from his responsibility.

Claimant violated the "Safety First" rule as well as Rule 1042. He had a fair trial.

We highly commend claimant for his eloquent statement at his hearing, as follows:

> "When we come into the terminal now, we are going to look and tell the engineer what's going on on the track, in-going and out-going, and instruct the engineer on the conditions we are under, *and nothing will be left to doubt.*" (Emphasis supplied).

Ten demerit marks cannot long mar the record of an employe who accepts his mild discipline so sincerely and responsively.

Award: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD

By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 24th day of June 1955.

Attachment to Enclosure 7 to Government Exhibit A

Award 17518
Docket 33432

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

39 South La Salle Street, Chicago 3, Illinois
With Referee Mortimer Stone

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

UNION PACIFIC RAILROAD COMPANY (Eastern District)

Statement of Claim: "Request Yardman Maurice P. Worland, Denver, Colorado, be returned to service with seniority and vacation rights unimpaired, and with pay for all time lost from August 19, 1954 until date reinstatement is completed, with no deduction in outside earnings."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claim of yardman for return to service and pay for all time lost.

Claimant was charged with violation of several rules and after investigation was found at fault therein and 45 demerits were placed against his record. Having previously been debited with 45 demerits the new penalty

made a total of 90 demerits which, under the system of discipline in effect on the property, required dismissal.

Claimant who was working as long fieldman was instructed by his foreman to couple six cars of stock to those already switched to Track Hill 1 and shove them westward sufficiently to leave room for three cars. Claimant thereupon shoved the cars without learning how many cars were on the track or whether they were coupled or whether anyone was protecting the other end of the movement when it was too dark to see the end of the cut or position of the switch. In so doing he shoved other cars previously left on the track causing them to roll out and collide with a Diesel yard engine with resultant damage.

Substantially all this was admitted by claimant and petitioner here seeks his reinstatement because of asserted customary practice and equal negligence of other employes in bringing about the accident. Neither can absolve claimant from blame. The penalty might seem over severe but his fault being admitted, his record was properly considered and we cannot say that discharge was not justified. He had been penalized and discharged on numerous occasions and his last reinstatement was sought and obtained by petitioner with the understanding that further infractions of the rules would not be tolerated by the carrier or brotherhood.

Award: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD

By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 12th day of June, 1956.

Attachment to Enclosure 7 to Government Exhibit A

Award 19206
Docket 34967

NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION
39 South La Salle Street, Chicago 3, Illinois

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD TRAINMEN

DELAWARE AND HUDSON RAILROAD CORPORATION

Statement of Claim: "Claim (a) exoneration from responsibility for damage and (b) pay for seven days' suspension assessed Yard Foreman John Kranick based on Article No. 25 'D' of current agreement."

Findings: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employe within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was waived.

Claimant admits that had he walked to the north end of this car, he could have seen the unloading ramp. His admitted nonobservance of the rules compels a denial award.

Award: Claim denied.

NATIONAL RAILROAD
ADJUSTMENT BOARD

By Order of FIRST DIVISION

ATTEST: J. M. MacLeod
Executive Secretary

Dated at Chicago, Illinois, this 25th day of May 1959.

Enclosure 8 to Government Exhibit A

Mr. John E. Manley
General Manager
The Alaska Railroad
U. S. Department of the Interior
P. O. Box 7-2111
Anchorage, Alaska 99501

Dear Mr. Manley:

This refers to your appeal from the decision of the Commission's Seattle Regional Office disapproving the action of the Alaska Railroad whereby Mr. Robert W. Freeman was discharged, effective November 29, 1963, from a position of Brakeman (Yard) at Anchorage, Alaska, on charges of having accumulated demerits in excess of those allowable for retention in the service.

The Board of Appeals and Review has fully considered the appellate record in Mr. Freeman's case, including your representations and the representations to the Board by Mr. George S. Parish, Legal Consultant for the Veterans of Foreign Wars of the United States and attorney for Mr. Freeman.

The record shows that as a result of hearings held on March 20, 1963, April 22, 1963, and July 3, 1963, Mr. Freeman was assessed 30, 30, and 25 demerits respectively for violations of the provisions of Alaska Railroad Rule 701 prohibiting absence without proper authority. Mr. Freeman thus acquired a total of 85 demerits. The published policy of the Alaska Railroad is to dismiss from the service any employee whose demerit record shows an accumulation to the number of 90. (The policy includes provisions for cancellation of demerits on the basis of maintaining a clear record for at least six months.) As a result of a hearing held on October 11, 1963, Mr. Freeman, Conductor R. G. Ray, and Brakeman J. C. Nichols were each assessed 30 demerits because they were held

responsible for an accident on October 3, 1963, which established violation of a provision of Alaska Railroad Rule 801 prohibiting the movement of a car until it is known that the car can be moved with safety. Mr. Freeman thus accumulated the total of 115 demerits which was the basis for his dismissal. On appeal to the General Manager of the Railroad, the number of demerits assessed Messrs. Freeman, Ray, and Nichols for violation of Rule 801 was reduced from 30 to 15, but this reduction still left Mr. Freeman with an accumulation of 100 demerits. Since, moreover, the minimum assessment of demerits under the Alaska Railroad's system of discipline is five, any assessment of demerits to Mr. Freeman as a result of the accident on October 3, 1963, would necessarily have increased his accumulation from 85 to the 90 which is cause for dismissal from the service.

In its consideration of Mr. Freeman's case, the Commission's Seattle Regional Office found no violation of his procedural rights and no issue with respect to the 85 demerits assessed for violation of Rule 701. It was the view of the Seattle Regional Office, however, that the evidence of record did not show Mr. Freeman to have had a direct responsibility for determination of physical conditions around the freight car which was improperly moved on October 3, 1963. The Regional Office therefore concluded that violation by Mr. Freeman of Rule 801 was not substantiated by the evidence, that demerits for such violation should not have been assessed to him, and that his discharge for accumulation of excess demerit was unwarranted. The corrective action recommended by the Seattle Regional Office was that Mr. Freeman be restored retroactively to the position from which he had been discharged.

You contend that the Seattle Regional Office erred in not finding Mr. Freeman to have violated Rule 801 and that any railroader knows Rule 801 applies to every member

of the train crew who is in a position to know that a car can or cannot be moved with safety. You contend further that Conductor Ray and Brakemen Freeman and Nichols were each physically able to examine the conditions surrounding the switching of the car at the Air Van Lines warehouse on October 3, 1963, and that no one of them made the effort they were capable of making and which was necessary to know that the car could or could not be moved with safety. The requirements of Rule 801 in this instance were, you state, for the crew to get off the engine and walk not more than 50 feet round trip to make certain that the car could not be moved with safety. Thus it is your position that the conductor and each brakeman was guilty of violation of Rule 801 and that a brakeman cannot excuse his violation of a safety rule by the fact that the conductor in charge also violated it.

Mr. Parish, on the other hand, contends that Rule 801 is ambiguous and does not fix responsibility on any particular employee for any particular duty. Mr. Parish also contends that under the circumstances at the Air Van Lines warehouse on October 3, 1963, it was humanly impossible for Brakeman Freeman or Conductor Ray to walk the 25 feet to ascertain whether the car was safe to move because Brakeman Nichols had already given the proceed sign to the Engineer immediately upon coupling the engine to the car.

Concerning the clarity of Rule 801, the Board does not find such ambiguity therein as to justify a conclusion that the rule did not fix responsibility upon Mr. Freeman, as well as upon Messrs. Ray and Nichols, in the circumstances of the accident which took place on October 3, 1963, at Air Van Lines warehouse. The record shows that Mr. Freeman started releasing the hand brake on car # 10353 immediately after the couping of the locomotive to the car and before Mr. Nichols had given the signal to move the car. Mr. Freeman's action releasing the hand brake was not specifically directed by the conductor, and

Mr. Freeman took that action on his own initiative without assuring himself that the car could be moved with safety. In this connection, Mr. Freeman's statement in his appeal to the Railroad's General Manager was, "I surmised Mr. Nichols had already checked the car." In the opinion of the Board, Mr. Freeman thus implicitly admitted his violation of Rule 801, and the fact that two other members of the same crew including the conductor, were also in violation of the same rule does not absolve Mr. Freeman of his responsibility. Because Mr. Freeman had accumulated 85 demerits in the seven months preceding the accident at the Air Van Lines warehouse, because the minimum assessment of demerits is five, and because 90 demerits warrants dismissal under the Alaska Railroad's system of administering discipline, the Board concludes that Mr. Freeman's dismissal on charges of having accumulated demerits in excess of those allowable for retention in the service was for such cause as will promote the efficiency of the service.

In view of the foregoing, and as a result of its full review of the appellate record, the Board of Appeals and Review reverses the decision of March 20, 1964, by the Commission's Seattle Regional Office disapproving the discharge of Mr. Robert W. Freeman, and the action of the Alaska Railroad making his discharge effective November 29, 1963, is hereby sustained. Accordingly, the recommendation by the Seattle Regional Office for the retroactive restoration of Mr. Freeman is withdrawn.

For the Commissioners:

Sincerely yours,

E. T. GROARK
Chairman, Board of Appeals
and Review

• • • •

Enclosure 18 to Government Exhibit A

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
THE ALASKA RAILROAD
P. O. Box 7-2111
Anchorage, Alaska, 99501

January 30, 1964
Your reference:
JJM:jg

Mr. J. J. Murray
Appeals Examiner, Seattle Region
U. S. Civil Service Commission
Federal Office Building
Seattle 4, Washington

Dear Mr. Murray:

Acknowledged is your memorandum of January 22, 1964, requesting information on the Alaska Railroad removal action and appeal of Brakeman Robert W. Freeman; and, attached thereto, Mr. Freeman's undated appeal to the Manager, Branch Office, U. S. Civil Service Commission, Anchorage, Alaska.

* * * *

Paragraph 1 of Mr. Freeman's letter:

> We do not agree that the action as a result of the October 11, 1963 hearing was unjust. Three members of the train crew were on the platform of the locomotive approaching boxcar 10353 standing at the warehouse, the crew coupled into the car with the locomotive, released the brakes and pulled the boxcar from its parking place. The three members of the crew were equally responsible for the damage incurred to the car and warehouse because none of the three assured himself the car was safe to move. Rule

801 requires, in train or yard service, that before cars or engines are moved in a street or on station or yard tracks, it must be known that the cars can be moved with safety, placing responsibility for such movement on this train crew.

It is not unusual to assess demerits to each crew member instead of charging one individual of the crew with the total responsibility. To exemplify, these three instances are occasions when assessment of demerits was issued to more than one crew member:

Conductor J. F. Patton and Engineer A. W. Celkis assessed 30 demerits each for violation of Rule 86, which occurred on June 27, 1961.

Engineer L. Harrington and Fireman D. E. Reynolds assessed 20 demerits each for violation of Rule 104, which occurred on August 27, 1961.

Conductor P. Roberts and Brakeman R. Lowe, violation of Rule 99—Conductor Roberts assessed 60 demerits, Brakeman Lowe terminated, which violation occurred on May 3, 1962.

Paragraph 2 of Mr. Freeman's letter:

There was no discrimination against appellant. The records of the conductor and other brakeman were adjusted to show the assessment of 30 demerits and were later reduced by 15 by appeal to the General Manager (Exhibit 16). Even with the initial assessment of 30 demerits each, the accumulated demerits of the conductor and other brakeman would not have been cause for their removal. Mr. Freeman had accumulated 85 demerits for previous violations prior to the incident of October 3, 1963. Other employees have been removed from service when they have accumulated 90 demerits. Demerits are issued after review of the formal hearings (Exhibits 3, 4, 5, 6) by an official of the Railroad to whom is delegated decision-making authority, including assessment of dis-

ciplinary demerits. In the hearing employees may present evidence, witnesses, representation, etc. to best protect their interests. Employees who make false reports or statements or conceal facts concerning matters under investigation are subject to dismissal. Disciplinary demerits may be appealed for higher review to the General Manager by the employee or his representative.

Paragraph 3 of Mr. Freeman's letter:

In the instant case, Mr. Freeman was equally responsible, under Rule 801, with the other train crew members for the movement and damage incurred, for, as previously described, the three trainmen on the open platform of the locomotive approached the boxcar and moved same without assuring themselves, collectively or individually, that it was safe to move. The other employees involved in this October 3 incident did not have accumulated demerits. Mr. Freeman was separated from the service as a result of accumulating 90 demerits, not for the one incident in violation of Rule 801 that occurred in Exhibit 6.

Paragraph 4 of Mr. Freeman's letter:

The statements in Mr. Freeman's last paragraph are irrelevant as to whether the car was released by Air Van Lines or was not released. The crew was *instructed*, by switch list given by their supervising yardmaster, to switch the boxcar, and prior to such movement the crew was responsible for assuring themselves that it was safe for movement, as required by Rule 801.

Sincerely yours,

/s/ W. C. Davidson
W. C. DAVIDSON
Superintendent of
Transportation

Attachments (16)

Exhibit 12 to Enclosure 18 to Government Exhibit A

Mr. John E. Manley
General Manager
Alaska Railroad

I would like to appeal to you for consideration in regard to my separation from service with the Alaska Railroad. I think the number of demerits was excessively high in the case concerning Air Van Lines Warehouse.

When we went in to Air Van Lines that night, Ed Ray, J. C. Nichols and I were on the back platform. When we made the joint, Nichols was on the ground. The joint made, and as the slack ran out, I released the brake. I surmised Mr. Nichols had already checked the car. It is the rule for the field man to check the car for safety in movement, whether it be one car or ninety cars you have to rely on him. When I heard the noise, I yelled at Mr. Nichols, being in no position to give a stop-sign.

I have never been in any violation with the rules governing movement of equipment, and have worked in every yard on the Alaska Railroad, in every weather condition we have.

Mr. Davidsons action is not based on the hearing of October 11th, 1963, but on an accumulation of demerits. I don't understand the number of demerits assessed for this particular incident. I do not think I should have gotten any. I am asking, sir, if you would re-examine my case.

/s/ Robert W. Freeman

This is a certified true copy.

/s/ R. R. Mack
Personnel Officer
The Alaska Railroad

Extract from Attachment to Enclosure 18 to Government Exhibit A

Examination of Employees on the Transportation Rules and General Instructions of the Alaska Railroad, Effective July 1, 1947, dated approved 5/12/60.

* * * *

546. Q. Before moving cars or engines in a street, or on station or yard tracks, what must be known?
A. That the cars can be moved with safety.

* * * *

Examination of Employees on the Transportation Rules and General Instructions of the Alaska Railroad, Effective July 1, 1947, Approved 4/24/61.

546. Q. Before moving cars or engines in a street, or on station or yard tracks, what must be known?
A. That it is clear and protected.

Exhibit 1 to Enclosure 22 to Government Exhibit A

February 14, 1964
Re: JJM:jg

Mr. J. J. Murray
Appeals Examiner
Eleventh Civil Service Region
U. S. Civil Service Commission
Federal Office Building
Seattle 4, Washington

Dear Mr. Murray:

After careful study of the Supt. of Transportation, Mr. William C. Davidson's letter to you under date January 30, 1964 and review of the exhibits which accompany same, at this time I wish to make the following rebuttal.

In reference to exhibit = 6: I believe the Alaska Railroad is the only Federal Agency of our government which applies the demerit system. This I contend is only a method designed to hold an employees past rule violations against him or her and is unjust inasmuch as there is no set amount of demerits for each specific offense. In the General Managers letter to me of December 11, 1963, Mr. Manley upheld the Supt. of Transportations decision of the thirty (30) demerit assessment of my personal record. Then on January 14, 1964, the General Manager advised me via the mails that he agreed with out Brotherhood of Railroad Trainmen's representative to adjust the discipline assessed from thirty (30) demerits to fifteen (15) for each crew member. This reduction still leaves me over the alloted limit which constituted my dismissal. I believe the General Manager received word of my pending appeal to the Civil Service Commission and made the gesture of reducing my assessment of demerits by fifteen (15) in an effort to impress the Civil Service Appeals Examiner with his leniency. This action of Mr. Manley's seems to be just white-wash.

In reference to exhibit # 7. General Circular 11, para. 1-C under "THE ADVANTAGES OF THIS SYSTEM ARE: states; "to avoid loss of wages and consequent hardships to employees and their families because of being deprived of their regular income." My dismissal, due to the demerit system has resulted in the loss of my regular income. At this time I cannot see the advantages of this system, because its end result has deprived me of my regular income and further I believe the Alaska Railroad demerit system is in every way foreign to the more just Civil Service Commission procedures and therefore illegal by Civil Service Commission standards.

In the first part of paragraph # 2 of the General Managers letter to me under date of January 14, 1964, exhibit # 16, Mr. Manley states; "I have reviewed the entire file in the case and, although I feel there was equal responsibility among the crew members,"—If the Commission will inquire of any other railroad I believe the Commission will find that the primary responsibility lies with the Conductor of a train or the Conductor's *Switch Foreman* of a switch crew for the following reasons:

1. The Conductors *Switch Foreman* is my immediate superior and the two brakemen are his assistants under his direction and explicit orders. If a brakeman does not follow his instructions he can be charged with insubordination and if found guilty can be disciplined.

2. For this additional responsibility there is additional compensation as listed below in the various categories on the Alaska Railroad:

COMPENSATION RATES PER	100 MI. or 8 HRS.	Per Hour
PSGR TRAIN SERVICE CONDR.	$26.44	$3.305
BKMN.	24.52	3.065
FREIGHT TRAIN SERVICE—CONDR.	27.81	3.46625
FREIGHT TRAIN SERVICE—BKMN.	25.36	3.17
WORK TRAIN SERVICE—CONDR.	28.08	3.51
BKMN.	25.87	3.23375

COMPENSATION RATES PER	100 MI. or 8 HRS.	Per Hour
SNOWFLEET SERVICE—CONDR.	$29.04	$3.63
CONDR. PILOT	29.75	3.71875
BKMN.	26.45	3.30625
YARD (SWITCHING) SERVICE—		
CONDR.	32.46	4.0575
BKMN.	30.65	3.83125

3. If the management of the Alaska Railroad want to hold the brakemen *EQUALLY* responsible with the Conductor we should receive *EQUAL* compensation for this added responsibility. I do however concede that the entire three man crew should be responsible, but not *EQUALLY* so, as the management contends.

4. Aboard trains moving on the main line the Conductor and the Locomotive Engineer are EQUALLY responsible for the safe movement of the train over the main line, in addition the Locomotive Engineer is directly responsible for the efficient operation of the locomotives and their care and is the Locomotive Fireman's immediate superior, the fireman is subject to his orders and instructions. For this the Engineer receives additional compensation. It would definitely be unfair to hold the Fireman equally responsible under these conditions, and justice wouldn't be done.

5. Mr. E. G. Ray was my conductor on October 3, 1963. Refering to Exhibit = 15. Mr. Ray has passed the written and oral examinations for the Conductors position. The same applies to Field Brakeman J. C. Nichols, who has also passed these tests, and has worked as a Conductor for a number of years here on this railroad. I have not taken the Conductors examination as the other crew members have, nor have I worked in that category on any railroad.

6. Attached herewith is a statement from Conductor E. G. Ray, which states he feels "assessing of the above demerits to Mr. Freeman was uncalled for."

In reference to exhibt # 14, concerning the estimated cost of repair to be $1,000.00, exhibit # 14 does not say what was repaired, but I will give the management the benefit of the doubt and assume it was Air Van Lines warehouse door, which was damaged on October 3, 1963. My representative Mr. David R. Seely, Post Service Officer, Denali Post 1685, Veterans of Foreign Wars of the United States, made an inquiry of the Manager of Air Van Lines as to the extent of the cost of repairing the damaged door. The Air Van Lines manager informed Mr. Seely "I have no idea what the cost amounted to, because the Alaska Railroad had their employees do the repair job. I believe managements cost estimate of this repair job at $1,000.00 to be purposely exaggerated for the express purpose of warranting my involuntary separation from the Federal Service, and to sway the decision of the Civil Service Appeals Examiner considering this appeal.

Reference is made to the last paragraph of Mr. William C. Davidson's letter under date of January 30, 1964, in which Mr. Davidson states: "The statements in Mr. Freemans last paragraph are irrelevant as to whether the car was released by Air Van Lines or was not released." I content that the fact Air Van Lines had not released the car for movement is most relevant to this appeal. Had Air Van Lines released the car and their employees had failed to remove the steel loading plate, Air Van Lines would not have been able to hold the Alaska Railroad responsible for the repair and subsequent cost, as the fault would have been on the part of their own employees; however, our supervising yardmaster took it upon himself to have our crew move this car, causing the damage to the building, resulting in the Alaska Railroad having to repair the building at their own expense. I contend the supervising yardmaster should be held accountable for his share of blame, especially since the yardmaster was acting in his official capacity as an Alaska Railroad officer. It is set procedure for companies such as Air Van Lines

to release their cars for movement, otherwise a crew could be moving cars half unloaded.

In reference to exhibits 1A., 1B., 2A., 2B., 3, 4, 5, 8, 9, 10, 11, 12, 13, these then exhibits are merely part of the record and on them I have no comment.

I would like the Appeals Examiner to give particular study to exhibit = 6, and Conductor E. G. Ray's statement of February 12, 1964, as this is the transcript of the hearings held on October 11, 1963 in which the entire crew, including the engine crew, testified at this hearing for our alledged violation of Rule 801 of the Operating Rules. The testimony given in this hearing by Conductor E. G. Ray and Field Brakeman J. C. Nichols was the truth. I could not have had time to get on the ground, even if I desired to inspect the car, and at the same time release the hand brake from the car, before the signal to proceed was given to the Engineer. Everything happened so quickly, and I wasn't in a position to view the side of the car at all, as it was my duty to see that the hand brake was released, and this I did.

I contend it was unjust for me to receive any demerits in this particular case. I believe I was given these additional demerits solely on my previous record and that this was a convenient way for the management of the Alaska Railroad to get rid of me, by giving thirty (30) demerits to the entire crew then reducing them by fifteen (15), knowing full well I couldn't stand even five (5) demerits.

In conclusion, Mr. David R. Seely, V.F.W. Post Service Officer, has assited me on January 7, and 16, in preparing this appeal. Mr. Seely has also assisted me in preparing this rebuttal today. He is also an Alaska Railroad employee and has worked as both a Conductor and Brakeman for this railroad for over 17 years. At this time we both wish to thank you kindly for the forms 307, which I have

signed and given to Mr. Seely. We also wish to thank you for your indulgence in this matter.

Sincerely yours,

/s/ Robert W. Freeman
ROBERT W. FREEMAN

Enclosure 26 to Government Exhibit A

[SEAL

UNITED STATES
DEPARTMENT OF THE INTERIOR
THE ALASKA RAILROAD
P. O. Box 7-2111
Anchorage, Alaska, 99501

March 13, 1964

Director, Seattle Region
U. S. Civil Service Commission
Federal Office Building
Seattle 4, Washington

Attention: Mr. J. J. Murray, Appeals Examiner

Dear Sir:

This will acknowledge your letter of March 6, 1964, your file reference, SE:JJM, in the case of Robert W. Freeman, requesting information as to how management determines the number of demerits assessable.

The demerit system applied on The Alaska Railroad is governed by the same concept of discipline for suspension or dismissal on the railroads in the contiguous states. The assessment of discipline is determined as a result of constant study of awards issued by the National Railroad Adjustment Board who have settled railroad disputes over a period of almost thirty years. It is experience developed by management officials to determine equitable and just treatment for rule violations, basing this experience upon past practice cases on this and other railroads. In view of the vast amounts of personal property in the railroad's hands, such responsibility for its safekeeping must be coupled with an adequate means of meeting this responsibility.

However, the operating responsibility of the railroads to safely service the shipping and traveling public is spelled

out in a report of an Emergency Board to the President of of the U. S. May 6, 1946 in a Chicago, Rock Island Pacific Railroad—B. of R. T. case which sums up the entire matter to handle. Many awards have recognized this, and in handling cases involving impositions of discipline have emphasized the fact that the safe conduct and operation of railroads is the responsibility of carriers. The imposition must of necessity be within their discretion, and if such is exercised judiciously, without malice, bias, or prejudice, and without tinge of unfairness and bad faith, such exercise of judgment must not arbitrarily be tampered with. . . .

As a general rule, it would be well to maintain a reasonable yardstick in assessment of discipline for certain violations so that equal discipline is assessed all employees. But each case must be handled on its own merit, giving due degree of responsibility to one individual as compared to another. A standard of discipline for each type of violation and for each employee cannot be maintained and such a practice, in itself, would fail to recognize the past service records of the employees. Due consideration is given to the seriousness of the rule infraction and the employee's personal record when assessing discipline but only for the purpose of arriving at the measure of discipline and never as a factor in determining guilt in the particular case being assessed.

Yours very truly,

/s/ W. C. Davidson
W. C. DAVIDSON
Supt. of Transportation

cc: JEManley
RRMack
HLazelle

Enclosure 27 to Government Exhibit A

[SEAL]

UNITED STATES
DEPARTMENT OF THE INTERIOR
THE ALASKA RAILROAD
P. O. Box 7-2111
Anchorage, Alaska, 99501

March 17, 1964

Director, Seattle Region
U. S. Civil Service Commission
Federal Office Building
Seattle 4, Washington

Attention: Mr. J. J. Murray, Appeals Examiner

Dear Sir:

Reference your letter of March 13, 1964, file reference JJM:jg, requesting clarification of the underscored part of my letter of January 30, 1964 in regards to the three crew members. You are correct in assuming that the engineer and fireman were absolved of any responsibility for the accident wherein Mr. Freeman and two other trainmen were disciplined.

The engine crew moves the engine upon signals received from the trainmen. Enginemen are not in position to determine "if cars can be moved with safety," or have knowledge why cars are moved or not moved as the conditions require. The trainmen use signals directed to the enginemen for movement of the engine regardless if engine is coupled to cars or not. In this particular accident where Mr. Freeman was involved the enginemen were absolved from responsibility in acordance with the signals received from the trainmen.

To further exemplify the moving of the engine upon signals received from the trainmen, I am quoting Rule 7 (a) of the Operating Department Rules.

"Signals must be used strictly in accordance with the rules; and trainmen, yardmen, enginemen and all concerned must keep a constant lookout for them. Those giving signals must locate themselves so as to be plainly understood. The utmost care must be exercised by trainmen, yardmen and enginemen to avoid taking signals that may be intended for other trains or engines. Unless trainmen, yardmen and enginemen are positive that signals given are for them, they will not move their train until communication is made by words. When moving a train or cars, the disappearance from view of trainmen or light by which signals are given, must be construed as a stop signal."

If I may be of further assistance on this matter, please do not hesitate to call or write.

My reply to your letter of March 6, 1964 was mailed to you March 13, 1964.

Yours very truly,

/s/ W. C. Davidson
W. C. DAVIDSON
Supt. of Transportation

cc: JEManley
RRMack
HLazelle

Government Ehibit B to Cross-Motion for Summary Judgment

[Caption Omitted]

Filed Dec. 1, 1966
Robert M. Stearns, Clerk

AFFIDAVIT

Stewart L. Udall, being duly sworn, deposes and says:

I am the Secretary of the Interior of the United States.

I have considered the letter from Mr. D. Otis Beasley, then—Assistant Secretary for Administration of this Department, to Messrs. Lee and Wright, dated September 1, 1965, Attachment B to plaintiff's motion for summary judgment in this action. I am aware that the plaintiff argues that the letter indicates that "the glaring indefiniteness of [Rule 801] has been officially recognized by the Department of Interior". The provision states:

> Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety.

There can be no question about the importance of safety in the extremely dangerous matter of yard crew work. Nor can there be any doubt that a strong, enforced set of rules for performing this assignment can help to prevent accidents. Also, the provision that is involved here plays an important role in assuring railroad safety not only on The Alaska Railroad but on a substantial number of other railroads.

For these reasons, I have considered Rule 801 and the inference which plaintiff draws from the September 1, 1965 letter. Insofar as the letter may be construed to express doubt upon the clarity of Rule 801, I wish to state

that the Department's position is that there is no doubt about the validity of Rule 801, and specifically that the Rule is not void for indefiniteness.

Rule 801 places the responsibility for preventing accidents due to the movement of cars upon each member of a train or yard crew who is in a position to check whether a car can be moved with safety. A member of a crew in a position to determine whether a car can be moved with safety cannot excuse his failure to perform this duty by assuming that some other member of the crew was making the necessary check.

/s/ Stewart L. Udall

Subscribed and sworn to before me this 29th day of November, 1966, at Washington, D.C.

/s/ Mary M. McLaughlin
Notary Public

My Commission expires
February 20, 1968.

Government Exhibit C to Cross-Motion for Summary Judgment

[Caption Omitted]

Filed Dec. 1, 1966
Robert M. Stearns, Clerk

AFFIDAVIT

John E. Manley, being duly sworn, deposes and says:

I reside at 1524 Hidden Lane, Anchorage. I am General Manager of The Alaska Railroad. I first went to work for the Railroad in 1937 and have been in its employ continuously since May 1 of that year. I became a locomotive fireman in 1939, a locomotive engineer in 1942, Road Foreman of Engines in 1944, Superintendent of Transportation in 1948, Assistant General Manager in 1949 and General Manager in 1962.

The second paragraph of Rule 801 reads as follows:

> Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety.

This section of the rule has been in effect at least since 1939 on the Alaska Railroad. In addition, similar rules, which include a provision virtually identical to that quoted, have been in the *Consolidated Code of Transportation Rules and General Instructions* since 1939 and this Code is used by the Chicago, Milwaukee, St. Paul and Pacific Railroad, the Great Northern Railway Company and affiliated lines, the Northern Pacific Railway Company and affiliated lines, the Spokane, Portland, and

Seatle Railway and affiliated lines, and the Union Pacific Railroad, Northwestern District.

Rule 801 is part of a section of the rules headed "Train or Yard Service." The quoted part of Rule 801 places the responsibility for preventing accidents due to the movement of cars upon each member of a train or yard crew who is in a position to check as to whether a given car or cars can be moved with safety.

A brakeman in a yard crew may be a quarter mile distant from the scene of the movement of a given car. He is therefore not in a position to make the necessary check. The engineer and fireman are normally not required to step down from the cab of a locomotive to determine whether a particular car can be moved with safety because their duties normally require them to man the locomotive controls and maintain a lookout from the cab. No member of a crew, in a position to determine whether a car can be moved with safety, can excuse his failure to perform this duty by stating that he assumed that some other member of the crew had made or was making the necessary check.

The quoted language does not divide the responsibility for seeing that a given car can be moved with safety between those crew members who are in a position to make this determination. Instead, it places full responsibility on each such crew member. Yard crew work is essentially hazardous and safety would be jeopardized if the rule were anything less than this.

The responsibility of the yard crew, as thus defined, is an effective deterrent to accidents. If one member of a crew fails to take the necessary action to prevent an accident, a second, or even a third may prevent the accident by obeying the rule and making up for the first or second man's omission. This does not diffuse responsibility, because if three members of a crew fail to take required

action, and each had an opportunity to do so, each of the three is subject to discipline.

s/ John E. Manley
JOHN E. MANLEY

Subscribed and sworn to before me this 21st day of November, 1966, at Anchorage, Alaska.

s/ George C. Carrick
Notary Public

Notary Public in and for the
State of Alaska

My Commission Expires March 23, 1967.

[Caption Omitted]

Filed Dec. 7, 1966
Robert M. Stearns, Clerk

Statement of Points and Authorities
In Opposition To
Defendants' Cross Motion For Summary Judgment

Plaintiff heretofore has filed a Motion For Summary Judgment to which was appended a "Statement of Material Facts As To Which There Is No Genuine Issue." In their Cross Motion For Summary Judgment and their Memorandum of Points and Authorities In Support of Motion For Summary Judgment, defendants have not filed any statement controverting any of the facts as set forth in plaintiff's Statement of Material Facts As To Which There Is No Genuine Issue. Accordingly, as provided by Rule 9(h) of the Rules of the United States District Court for the District of Columbia, the Court may rightfully assume that the facts as recited by plaintiff are admitted to exist without controversy. Many of these facts are included in the defendants' Statement of Material Facts In Support of Cross-Motion For Summary Judgment. However, there are significant omissions, which are set forth in Attachment A. Citations are made to plaintiff's Statement of Facts.

Argument

Plaintiff has previously submitted a detailed Statement of Points and Authorities in support of his motion for summary judgment. He rests on that Statement.

However, in view of the affidavit of Mr. Manley, there is appended as Attachment B an affidavit of Isadore G. Alk with respect to the rules contained in The Consolidated Code of Operating Rules. It will be seen that the

provision in The Consolidated Code is quite different. That Code requires knowledge that a car can be moved with safety before the coupling operation takes place. Under the Alaska Railway Regulation, there is no rule of requiring knowledge that a car can be moved with safety before coupling or release of the hand brake. The distinction is clearly apparent. Plaintiff violated no rule in the coupling of the cars and the release of the hand brake. Instead, he complied with a rule affirmatively requiring the release of the hand brake before movement of the car.

It is clear that the railroad here has improperly imposed a doctrine of collective responsibility.

It is also significant that Mr. Manley, in his affidavit, has not disclosed the steps taken by the Alaska Railroad "to insure that the responsibilities of individual crew members, the yardmaster, and others who may be involved in switching operations *are clearly defined in writing and understood by all* affected employees." Mr. Manley merely reiterates his argument that the rule applies to all persons who are in a position to determine whether a car can be moved with safety. Nowhere does he, either in his affidavit or in the administrative record, disclose how plaintiff was in a position to make this determination. We ask again, as we did in our earlier memorandum, what evidence is there in the administrative record or elsewhere that plaintiff knew that a signal to proceed would be given by Mr. Nichols and would be acted on by the engineer before compliance with Rule 801. The only person who knew that Mr. Nichols had not made a physical inspection and who nevertheless acted on Mr. Nichols' signal was the engineer. Yet he was absolved from responsibility. This is the height of administrative arbitrariness.

Conclusion

It is respectfully submitted that plaintiff's motion for summary judgment should be granted and defendants' cross-motion should be denied.

/s/ Keith L. Seegmiller
KEITH L. SEEGMILLER

/s/ Isadore G. Alk
ISADORE G. ALK

Attorneys for Plaintiff

Attachment A to Plaintiff's Statement of Points and Authorities

[Caption Omitted]

Statement of Additional Material Facts
As To Which There Is No Material Issue

1. On the evening of October 3, 1963, plaintiff was working as "head" brakeman of the yard crew. (Par. 5, Plaintiff's Statement). The plaintiff was the junior member of the yard crew. On the night in question, J. C. Nichols was functioning as "field" brakeman. As "field" brakeman, it was the primary responsibility of Mr. Nichols to determine, in areas other than the immediate vicinity of the switch engine, whether a car or cars could be moved with safety. As "head" brakeman, plaintiff's duties were primarily to work in the vicinity of the engine, coupling or uncoupling it to a car or cars. Mr. Nichols had passed the written and oral tests for the position of conductor and had worked as a conductor for a number of years for the Alaska Railroad. He was being used that night from the Conductors Extra Board and was being paid at conductors yard rate of compensation. (Par. 10, Plaintiff's Statement)

2. When the engine and the empty freight car were coupled, plaintiff stood from the back of the engine platform, reached up over the railing and released the hand brake located on the north end of the box car near the east side. While the hand brake was still spinning and plaintiff's foot was still on the engine platform railing. Mr. Nichols gave a signal to go ahead and the engineer started the engine forward in response to the signal. (Pars. 15, 24, 28, Plaintiff's Statement)

3. It was plaintiff's duty to release the hand brake. He had no time after the release of the hand brake and before the signal to proceed was given to get down to the ground and make a physical inspection. From his posi-

tion, he could not see around the freight car. (Par. 26-27, Plaintiff's Statement)

4. Section 855 of the Operating Rules provides:

> Trainmen on duty, when not engaged elsewhere. must occupy the posts assigned to them.

5. Mr. Ray, the conductor, was in charge of the yard crew. His duties and authority are specified as follows (Par. 7, Plaintiff's Statement):

> Rule 106. The conductor and the engineer. and the pilot, if any, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for safety.
>
> Rule 850. The general direction and government of a train is in charge of the conductor and all persons employed on the train are subject to his instructions. * * *
>
> Rule 853. Conductors must assure themselves that their subordinates are competent and instruct them if necessary in the performance of their duties. * * *

6. The conductor was aware of the positions occupied by the members of the crew (Par. 11, Plaintiff's Statement). There was no evidence that the conductor had issued any instructions to the plaintiff to check the box car. The conductor stated:

> "Having been a brakeman or conductor continuously since 1940, I can state that the assessing of the above demerits to Mr. Freeman was uncalled for."

(Par. 27, Plaintiff's Statement).

7. Had the plaintiff been the "field" brakeman. he would have made a physical inspection by walking around the car. (Par. 21, Plaintiff's Statement).

8. Paragraph 7 of Defendants' Statement of Facts is incomplete. The full facts are as follows:

Before October, 1963, plaintiff had on two occasions answered questions in the prescribed written examination for brakemen, to determine his knowledge of the operating rules of the Alaska Railroad. In a 1960 examination, the questions and answers included:

546 Q. Before moving cars or engines in a street, or on station or yard tracks, what must be known?
A. That the cars can be moved with safety.

In a 1961 examination, the questions and answers included:

546 Q. Before moving cars or engines in a street, or on station or yard tracks, what must be known?
A. That it is clear and protected.

/s/ Keith L. Seegmiller
KEITH L. SEEGMILLER

/s/ Isadore G. Alk
ISADORE G. ALK

Attorneys for Plaintiff

Attachment B

[Caption Omitted]

City of Washington)
) ss.
District of Columbia)

Isadore G. Alk, being duly sworn, on oath deposes and says:

1. That he is one of the attorneys for the plaintiff in the above entitled action.

2. That he has made a diligent search and inquiry in order to locate a copy of the *Consolidated Code of Transportation Rules and General Instructions* referred to in the affidavit of John E. Manley appended as Exhibit C to defendant's Cross-Motion For Summary Judgment and Opposition to Plaintiff's Motion For Summary Judgment. That among the concerns and agencies of whom inquiry was made were the Association of American Railways and the Interstate Commerce Commission. That he has been unable to ascertain the existence of a Code by such a name, but he was able to find *The Consolidated Code of Operating Rules*, Edition of 1959, which is used by the railroads mentioned in Mr. Manley's affidavit.

3. Rule 810 of The Consolidated Code of Operating Rules provides as follows:

> 810. Before coupling to or moving cars or engines in a street, or on station or yard tracks, it must be known that cars are properly secured and that they can be moved with safety.

4. Upon a detailed examination of The Consolidated Code of Operating Rules, affiant was unable to find any rule relating to the release of hand brakes when a car is added to the train. Specifically, affiant was unable to find

any rule similar to Rule 442 of the Operating Rules of the Alaska Railroad, which provides as follows:

> 442. When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved.

s/ Isadore G. Alk
ISADORE G. ALK

Subscribed and sworn to before me this 7 day of December, 1966.

/s/ William L. Mitchell, Jr.
Notary Public
District of Columbia
My Commission Expires March 31, 1969.

[Caption Omitted]

Filed Dec. 14, 1966
Robert M. Stearns, Clerk

RESPONSE TO PLAINTIFF'S STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE, AND TO PLAINTIFF'S STATEMENT OF ADDITIONAL MATERIAL FACTS AS TO WHICH THERE IS NO MATERIAL ISSUE

In this civil service employee discharge case, plaintiff moved for summary judgment, filing a statement of material facts. Defendants cross-moved for summary judgment, submitting a statement of material facts of their own, pointing out that they were submitting a fair summary, in their view, of the material facts as reflected in the certified Civil Service Commission[1] administrative records.

Plaintiff has filed a statement of additional material facts, purportedly listing facts that were included in his original statement, which have not been controverted.

In a case like this, the material facts are actually the CSC record itself, since the proper standard of review is whether the certified CSC records show that "there is a rational basis for the conclusions reached by the CSC. *Eustace* v. *Day*, 114 U.S. App. D.C. 242, 314 F. 2d 247 (1962), cited at page 7 of our memorandum of points and authorities. For this reason, the term "fair summary" was used to characterize our statement.

Nevertheless, in further general conformity with Rule 9(h), we submit clarification and refutation of plaintiff's initial and additional statement of material facts.

---

[1] Hereinafter "CSC" or "the Commission".

1. *Reply to Plaintiff's Initial Statement of Material Facts.*

Item 5. Although plaintiff referred to himself as a "head" brakeman in correspondence during the administrative proceedings, the term is without significance here. See item 10, below.

Item 6. Plaintiff omitted the underlined paragraph from its quotation of Rule 841, which provides, in its entirety:

> Yardmasters are responsible for conditions within yards. Trains and engines will be under the control of the Yardmasters, and all employees in train, engine or yard service will be subject to their direction as to movements within yards.
>
> *Road crews of trains entering yards will be responsible for their respective trains and engines until yarded or until the Yardmasters or their representatives take charge.*

Item 9. Since the term "Trainmen" is defined as including "Brakemen", it is plain that the Rules and Regulations do specify duties and responsibilities of Brakemen. Moreover, since Brakemen are engaged in Train or Yard Service, it is also clear that Rules and Regulations under that heading, such as Rule 801, also specify their duties and responsibilities.

Item 10. In stating that plaintiff was the junior member of the yard crew, we take it that plaintiff means in terms of service or seniority. The record does not show that he was the junior member of the crew in terms of duty and responsibility; in fact, the record supports a finding that he had equal responsibility under Rule 801 to determine that cars could be moved with safety.

Plaintiff claims that Mr. Nichols, as "field" brakeman, had the primary responsibility to determine, in areas

other than the immediate vicinity of the switch engine whether a car or cars could be moved with safety; that, as "head" brakeman, plaintiff's duties were primarily to work in the vicinity of the engine, coupling and uncoupling it to a car or cars. This "fact" is based on plaintiff's statement to that effect in the administrative record. However, there are numerous items in the record counter to this statement. For example:

> A. Enclosure 18, at page 4 (Superintendent Davidson) states: Three members of the train crew were on the platform of the locomotive approaching boxcar 10353 standing at the warehouse, the crew coupled into the car with the locomotive, released the brakes and pulled the boxcar from its parking place. The three members of the crew were equally responsible for the damages incurred to the car and warehouse because none of the three assured himself the car was safe to move . . . .
>
> B. Enclosure 7, at page 9, 12 (General Manager Manley): In his letter of appeal to the General Manager (December 6, 1963), Mr. Freeman states that brakeman Nichols was responsible for checking the safety of movement. Rule 801, of course, makes no such distinction.
>
> . . . [A] brakeman cannot avoid his own responsibility by alleging that other members of the crew were, in fact, responsible.
>
> C. Enclosure 18, attachment. National Railroad Adjustment Board Decision, *Brotherhood of Locomotive Firemen and Enginemen, Chicago and Northwestern Railway Company*, Award 17047. Claimant, C & NW fireman, as well as the engineer who was disciplined, was responsible for his engine as it approached the steam engine standing at the coal chute. Independently of the duty of others, it was his individual duty to exercise the degree of care required to avoid the collision with the steam engine.

The Board of Appeals and Review decision similarly stated that the Alaska Railroad contended that any railroader knows that Rule 801 applies to any member of the train crew who is in a position to know that a car can or cannot be moved with safety. There was ample basis in the record, then, for the Board's conclusion that the rule fixed responsibility upon Mr. Freeman as well as upon Messrs. Ray and Nichols, in the circumstances of the accident. Plaintiff's statement in the administrative record regarding his and Mr. Nichols' responsibility was a conclusion or an opinion, rather than a fact, and was to be considered by the Commission with the rest of the record, in arriving at its decision in this case.

Moreover, even in connection with plaintiff's statement, it must be noted that the platform and the boxcar *were* in the immediate vicinity of the engine, and that the boxcar *was* being coupled to the engine.

Item 12. The second paragraph of the quotation from Conductor Ray's testimony should read:

> Nichols, I believe was on the ground although I am not positively sure. He was on the bottom step of the engine when we coupled on the car. I remember seeing him look back, although it was very dark that night.

Item 25. We assume that plaintiff means in this item that defendant did not controvert the "allegations of fact" quoted at item 24. The allegations in the first paragraph quoted at item 24 are not allegations of fact, and were controverted. See item 10, above.

In the second quoted paragraph at item 24, plaintiff stated that he "was not in any way responsible for the primary movement of this car". To the extent that plaintiff refers to the fact that he did not give the signal to proceed, his statement is true. To the extent that he is speaking of his responsibility under Rule 801 for the

movement of the car, the allegation is not one of fact and was controverted.[2]

2. *Reply to Plaintiff's Statement of Additional Material Facts.*

To a certain extent, our comments with regard to plaintiff's original statement of material facts also apply to plaintiff's additional statement. However, although plaintiff claims that the additional statement merely provides those facts which were not controverted in our statement, plaintiff's additional statement actually adds a new set of facts. Thus, while plaintiff's original statement of material facts indicates quite correctly at several places that the record contains certain evidence or comments, in his additional statement plaintiff claims that selected matters evidenced are facts. To this extent, plaintiff has amended his original statement and has substituted a new statement of material facts. Nevertheless, we will reply to and to extent necessary clarify, matters contained in plaintiff's additional statement.

Additional item 1. Our position is stated at item 10. above.

Additional item 3. The Board of Appeals and Review decision is based on plaintiff's failure to assure himself that the car could be moved with safety *before* he released the handbrake. Therefore, the following facts are relevant to this item.

Plaintiff knew that it was unsafe to move the car without a physical check.[3] He merely surmised that a check

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[2] Even if there were facts in controversy in the Administrative proceeding, this would not create an issue of material fact here, where the question is whether the CSC records show that there is a rational basis for the Commission's decision.

[3] Plaintiff stated: "Well, as a rule, when I was field man I will walk around." *Cf.* plaintiff's additional statement 7, which converts

of some kind had been made.[4] On this assumption, he released the handbrake on the boxcar, without assuring himself that the boxcar could be moved with safety. Plaintiff was physically able to ascertain the existence of the platform, which was only 25 feet from his position on the locomotive.

Additional item 5. The underlined sentence is omitted from Rule 106, which provides in its entirety:

> The conductor and the engineer, and the pilot, if any, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection.
>
> *This does not relieve other employees of their responsibility under the rules.*

Additional item 6. Although Conductor Ray stated as indicated by plaintiff, the General Chairman of the Brotherhood of Railroad Trainmen, R. L. Shake, wrote to Mr. Manley as follows (Letter, January 11, 1964, set forth as Enclosure 7, page 9):

> Reference is made to your letter of January 8, 1964 wherein you advise that you cannot agree that Conductor Ray was less responsible, for damage to Air Van Lines Warehouse than the brakemen on the crew.
>
> You advise that you will, however, reduce the demerits for the entire crew on the basis that discipline assessed was too great for the offense. Please be advised that this committee accepts your decision and appreciates your consideration.

* * * *

---

this to a fact that, if plaintiff had been "field" brakeman, he would have walked around the car.

[4] Actually, the record makes it plain that plaintiff knew that Nichols did not physically check the car. In stating that he surmised Nichols checked the car, it is clear that plaintiff surmised that Nichols made a visual check from either the ground near the rear platform of the locomotive or the rear platform itself.

[Caption Omitted]

Filed Jan. 25, 1967
Robert M. Stearns, Clerk

ORDER

This matter having come before the Court on cross-motions for summary judgment, and upon consideration of these motions, the memoranda of points and authorities in support thereof and in opposition thereto, and of the other papers and exhibits filed herein, and counsel having been heard, and it appearing to the Court that:

1. Rule 801 of the Rules and Regulations of the Operations Department of the Alaska Railroad is not void for vagueness, but gave plaintiff fair and adequate notice of his responsibility; and

2. The Civil Service Commission's decision sustaining the action of the Alaska Railroad removing plaintiff for accumulating demerits in excess of the amount allowable for retention in service was not arbitrary and capricious, because there was a rational basis for the finding that plaintiff violated Rule 801 of the Operating Rules;

it is by the Court, this 25th day of Jan., 1967,

ORDERED that the defendants' motion for summary judgment be, and the same hereby is, granted, and this action is hereby dismissed; and it is

FURTHER ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, denied.

/s/ Burnita Shelton Matthews
United States District Judge

[Caption Omitted]

Filed March 20, 1967

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff in the above entitled case hereby appeals to the United States Circuit Court of Appeals for the District of Columbia from the Final Order entered herein on the 25th day of January, 1967, granting Defendants' motion for summary judgment, denying Plaintiff's motion for summary judgment and dismissing the action.

ISADORE G. ALK and
KEITH L. SEEGMILLER
Attorneys for Plaintiff

By: Keith L. Seegmiller
KEITH L. SEEGMILLER

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,941

ROBERT W. FREEMAN, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, et al.,
APPELLEES

Appeal from the United States District Court for the District of Columbia

---

C.A. No. 1521-66

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NATHAN DODELL,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Is Operating Rule 801 of the Alaska Railroad stating that "before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety" void for vagueness, or did it give appellant full and fair notice of his responsibility?

2. Is the Civil Service Commission's decision sustaining the action of the Alaska Railroad under Rule 801 unsupported by the evidence and without rational basis, where appellant brakeman failed to check the car being moved for safety in movement and merely relied on the surmise that another brakeman had made a visual check?

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TABLE OF CASES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,941

ROBERT W. FREEMAN, APPELLANT

v.

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APPELLEES

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is a civil service employee discharge case. After a finding that he had violated an operating rule governing railroad safety, appellant was discharged from employment by the Alaska Railroad pursuant to regulations prescribing dismissal upon accumulation of a certain number of demerits. Summary judgment below was granted in favor of appellee by Judge Burnita Shelton Matthews. Appellant in this appeal claims that the operating rule he was found to have violated is too vague and indefinite to support the disciplinary action against him.

and that there was no substantial evidence providing a rational basis for that action.

Appellant is a veteran who was employed as a brakeman by the Alaska Railroad, which is owned by the United States and operated by the Department of the Interior (J.A. 11, 28). Under the regulations of the Alaska Railroad, a demerit system was in effect which provided for the entry of demerits against the record of an employee. The regulations prescribed that when an employee's demerits accumulated to the number of ninety, he would be dismissed from service. The regulations included provisions for cancellation of demerits on the basis of maintaining a clean record for at least six months. (J.A. 17, 28, 36.) Prior to October 1963, appellant accumulated a total of eighty-five demerits for absence from duty without leave and for failure to comply with instructions from proper authority (J.A. 17, 28-29, 36-37). No question has been raised with respect to these demerits. By reason of an incident occurring on October 3, 1963 appellant was assessed additional demerits which brought his total in excess of ninety. As a result he was discharged by the Railroad, and here challenges the validity of that latter assessment. (J.A. 17-18, 31, 36-38, 48-49.)

The Alaska Railroad has promulgated a set of "Rules and Regulations of the Operations Department" similar to those of a number of railroads (J.A. 29, 64-65). The first sentence of the *General Notice* in the Rules and Regulations states: "Safety is of the first importance in the discharge of duty" (J.A. 29, 65). Rule 801, under which appellant's penalty was assessed, provides in pertinent part:

> "Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety" (J.A. 17, 29, 62).

Previous to October 1963 appellant had, on two occasions, answered questions involving Rule 801 in the prescribed written examination for brakemen to determine his

knowledge of the operating rules of the Railroad (J.A. 91, 112).

On the night of October 3, 1963, appellant was working as a brakeman of a yard crew in the yards of the Alaska Railroad at Anchorage. The yard crew consisted of five men, namely: Locomotive Engineman K. A. Fuller, Locomotive Fireman J. L. Strah, Conductor E. G. Ray, Brakeman J. C. Nichols, and the appellant Brakeman R. W. Freeman.[1] A yard crew performs switching operations within yard limits, making up trains, spotting cars at sidings, and removing cars from sidings after unloading is completed. (J.A. 12, 29.) General direction and government of a train is in the charge of the conductor (J.A. 13; Operating Rule 850). Certain particular duties of the yardmaster and the engine and train crews are specified in the operating rules (J.A. 12-14, 116; Operating Rules 106, 442, 840, 841, 842, 850, 853, 855, 921, 922, 923).[2] Certain rules governing safety apply to brakemen as to other members of the crew.[3]

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[1] Compare the distinction in the positions as "head" and "field" brakeman claimed to have been occupied by appellant and Mr. Nichols which is first set forth at Appellant's Br. 4 and is persistently urged thereafter with attendant inferences as to their respective responsibility for safety. This "fact," as the Government pointed out to the District Court, is based on appellant's own statements to that effect in the administrative record, and is countered by other items in the record. See J.A. 116-119.

[2] These rules are set forth as indicated in the Joint Appendix.

[3] These include in pertinent part:

Movement of Trains

106. The conductor and the engineer, and the pilot, if any, are responsible for the safety of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection.

This does not relieve other employees of their responsibility under the rules.

Train or Yard Service

801. * * * * Before moving cars or engines in a street, or on station or yard tracks, it must be known that the cars can be moved with safety. * * * *

[Footnote continued on page 4]

Testimony at a hearing conducted by Trainmaster W. R. Strong on October 14, 1963 concerning the incident of October 3 showed as follows. At 11:50 p.m. the yard crew attempted to remove an empty box car standing alongside the Air Van Lines Warehouse in the yard. The crew backed a switch engine in a southerly direction in order to couple to the car on the siding beside the west door of the warehouse. The engineer and fireman were at their stations in the cab of the locomotive.[4] The engineer was on the east or warehouse side and the fireman on the west side. The conductor and the two brakemen were riding the open back platform of the locomotive as it approached the box car. The conductor, Mr. Ray, was about at the center of the platform; appellant was standing on the same platform to Mr. Ray's east or left side closer to the warehouse; and the other brakeman, Mr. Nichols, was to the east or left of appellant on the lower step of the platform, on the engineer's side of the engine. (J.A. 14-15, 30, 41.)

Unknown to the crew, there was a steel platform extending from the warehouse door to the boxcar door, on the engineer's side (J.A. 14-15, 30). The headlight of the switch engine was on bright shining in the direction of the box car (J.A. 15, 41, 42, 43, 44). There was no warning light or other warning signal indicating the presence of the platform (J.A. 15, 30). None of the crew saw the platform running from the car into the ware-

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[3] [Continued]

Trainmen

850. * * * * Trainmen must be vigilant and cautious; must comply with the instructions of yardmasters within yard limits and be governed by the direction of agents in doing work at stations.

Under *Definitions* in the Rules and Regulations, brakemen fall within the category of trainmen.

[4] Rule 923 states:

While switching, the engineman and fireman must both remain on the engine and give close attention to signals. Engine must be handled with care while making couplings.

house (J.A. 16, 30, 42, 43, 44). No member of the crew walked to the opposite end of the box car (J.A. 30, 41).

Brakeman Nichols made the coupling between the engine and the box car by signaling the engineer (J.A. 16, 30, 44). Appellant then stood from the back of the engine platform, leaned over the engine railing, and released the hand brake of the box car located at the car's north end toward the east or warehouse side. (J.A. 16-17, 30, 44).[5] Appellant did not step to the ground (J.A. 17, 44). Mr. Nichols, who might have been on the ground,[6] gave the signal to go ahead and the engineer started the train forward (J.A. 16, 30, 42). A noise was heard, Mr. Nichols gave a stop sign, and the engineer stopped the train after traveling 3 or 4 feet (J.A. 16, 30, 42, 43). Damage to the box car and warehouse caused by dragging of the platform was estimated at $1000 (J.A. 17, 30).

Thereafter the Superintendent of Transportation absolved the engineer and fireman of responsibility (J.A. 17, 31, 100-101),[7] but determined that all three of the trainmen had violated Rule S01. Appellant was informed that his record was assessed thirty demerits, later re-

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[5] Rule 442 states:

Adding Cars to Train

442. When one or more cars are added to a train, trainmen must see that hand brakes are released before the cars are moved.

[6] In the course of later proceedings, it was claimed that Mr. Nichols did step to the ground.

[7] The engineer and fireman were exonerated because the engine crew moves the engine upon signals received from the trainmen; and enginemen must remain in the cab of the locomotive in order to operate it and therefore were not physically in a position to examine the car from any position except the locomotive cab. See J.A. 100-101; Rule 923. Compare Appellant's Br. 9, which asserts that "the engineer admittedly started up the engine knowing that Mr. Nichols had not walked around the freight car." The record fails to support this assertion, either in the citations given by appellant or elsewhere. See J.A. 43-44. And of course not only Nichols but also appellant and Conductor Ray had a duty to check.

duced to fifteen, and that it was proposed to remove him not earlier than thirty days later for accumulating demerits in excess of the allowable amount. (J.A. 17, 31, 36-38, 50.) Appellant responded to the opportunity granted him to be further heard on November 4, 1963 in the office of Superintendent W. C. Davidson (J.A. 50). He there complained that no penalty should have been assessed against him as he considered that his function was only to release the handbrake (J.A. 52-53). He admitted that all three trainmen were "in a position to determine if this car could be moved with safety" but this determination was not made by him because it seemed impractical (J.A. 51-52). Appellant agreed that an inspection of the car should have been made, but said this was "not up to the pin man" (J.A. 53). Yet he indicated that he knew it was unsafe to move the car without a physical check.* Though a light shined in the space between the car and warehouse, he "didn't even look" (J.A. 52).

By notice of November 27, 1963 appellant was removed from his position as brakeman effective November 29 (J.A. 48-49). He appealed the removal decision to J. E. Manley, General Manager of the Alaska Railroad. In his letter of appeal he stated that Mr. Nichols was on the ground when the coupling was made, and that when the appellant released the brake he "surmised that Mr. Nichols had already checked the car." He claimed it was the "rule" for the "field man" to check for safety in movement. (J.A. 90.) The General Manager sustained the removal action, and appellant appealed to the Seattle Regional Office of the Civil Service Commission. In his request for this review he contended that his duty was "primarily that of working in the vicinity of the locomotive coupling and uncoupling it to a car or cars," and that determination of the safety of movement "in areas other

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* Appellant stated:

"I have never went in there without checking when I am playing the field regardless. . . . Well, as a rule, when I was field man I will walk around" (J.A. 52).

than the immediate vicinity of the locomotive" was the duty of the other brakeman and the responsibility of the conductor. (J.A. 55.) Appellant claimed he was not "responsible" for movement of the car (J.A. 56). The Railroad responded that all three trainmen were equally responsible under Rule 801 "because none of the three assured himself that the car was safe to move" before moving it (J.A. 87-88, 89). Appellant filed a rebuttal letter in which he "concede[d] that the entire three man crew should be responsible, but not *equally* so" (J.A. 94). The Seattle Regional Office reversed, concluding that the evidence relied on by the Railroad was insufficient in light of what the employees saw as they approached, the physical duties performed by Mr. Nichols and appellant, the absence of evidence to establish appellant's "direct responsibility . . . for the determination of physical conditions around the freight car," and Rules 841 and 850 as to responsibility (J.A. 60-61).[*]

On appeal by the Railroad, the Board of Appeals and Review of the Civil Service Commission reversed the Seattle Regional Office and sustained the Railroad's action. The Board found no such ambiguity in Rule 801 as to justify a conclusion that it did not fix responsibility on all three trainmen in the circumstances of the case (J.A. 85). It noted that appellant released the brake immediately after coupling, before the signal to move, and without either specific direction by the conductor or assuring himself that the car could be moved with safety (J.A. 85-86). Moreover, the Board noted appellant's implicit admission of failure to so assure himself in his statement that he had "surmised Mr. Nichols had already checked the car," and pointed out that violation of the rule by two other crew members did not absolve appellant of his responsibility (J.A. 86). On further appeal to the Commissioners of the Civil Service Commission, the Board's action was sustained (J.A. 24, 34-35).

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[*] The cited rules deal with general responsibility of yardmasters and conductors (J.A. 12, 13).

STATUTE AND RULES INVOLVED

The statute involved is the Veterans Preference Act of 1944, as amended, Act of June 27, 1944, 58 Stat. 387, as amended, 5 U.S.C. § 851 et seq., the relevant section of which is reprinted in the Supplement to Appellant's Brief at 39-40. Specifically involved here is Rule 801 of the Rules and Regulations of the Operations Department of the Alaska Railroad, reprinted in pertinent part in this brief at 2. Also relevant are Operating Rules 106, 442, 840, 841, 842, 850, 853, 855, 921, 922, 923 and 928, appearing in the Joint Appendix at 12-14.

SUMMARY OF ARGUMENT

I

Appellant's primary complaint is that Operating Rule 801 of the Alaska Railroad is void for vagueness because it fails to particularize his duties with regard to safety. For argument he has compiled a series of hypotheticals which illustrate that any rule has borderline problems.

Rule 801 in the context in which it appears is a regulation of reasonable import purposed to prevent accidents in the course of a dangerous activity. It applies to train or yard crewmen in a position to know that a car can or cannot be moved with safety, such as was appellant. Of each such crewman, the rule asks simply that he take reasonable steps in the circumstances to inform and assure himself of the safety condition of the car preparatory to moving it. In appellant's case the rule required that he make a safety check calculated to insure that the car could be safely moved. Appellant admittedly failed to make either a visual or physical check for obstructions to movement of the car, merely surmising that another crewman had made a visual check. An accident resulted. The rule proscribes such carelessness in the performance of duty.

II

Appellant also complains that there was no substantial evidence that he violated the rule and the Commission's decision was therefore without rational basis. This is but a restatement of his claim that he was not responsible for making the required safety check. But the rule made him responsible with the other crewmen in a position to know the car could not be moved safely, and his admitted failure to check for safety in reliance upon a mere surmise that another brakeman had made a visual check amounted to a violation of the rule.

ARGUMENT

I. Operating Rule 801 is not void for vagueness.

Appellant's basic claim is that Operating Rule 801, one of the several hundred operating rules of the Alaska Railroad, is void for vagueness.[10] Not only does the rule not in terms designate the particular persons to whom it applies, he contends, but it fails to set forth any particular duties, or even to prescribe the particular relation between safety and the other functions of crew members. Appellant further urges that the Railroad has improperly shifted the premise for its action against him, although the only inconsistency we have found on this point appears in his own brief.[11]

Appellant's premise that the void-for-vagueness doctrine carries full impact in the field of employee discharge for violation of railroad safety rules is fundamentally defective. The vagueness doctrine is one of application basically to the area of criminal law.

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[10] Appellant's Br. 22-30.

[11] See Appellant's Br. 21-22, 25-26. Appellant's "theory of collective responsibility" by imputation of the dereliction of any crew member to all the others without regard to whether the others are reasonably in a position to know of such dereliction is a novel proposition appearing only in appellant's brief. His reference to the joint appendix does not support it. See J.A. 87, 89. The exoneration of the engineer and fireman from the start conclusively denies it.

> "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation."

Boyce Motor Lines Inc. v. *United States*, 342 U.S. 337, 340 (1952). While it is true that Government regulations for infractions of which penalties resulting in loss of employment may be imposed must be of sufficient definiteness to inform men of common intelligence of the required conduct, the pertinent realities may not be neglected. To say that the void-for-vagueness doctrine is applicable to non-criminal proceedings is not to say that the seriousness of what is at stake will not be an extremely significant variable in judicial determination of a vagueness attack.

> "The standards of certainty in statutes punishing for offenses is [*sic*] higher than in those depending primarily upon civil sanction for enforcement."

Winters v. *New York*, 333 U.S. 507, 515 (1948). And appellant's claim to the highest standard of certainty in the disciplinary action against him pales in the face of important requirements of railroad safety in which vast amounts of life and property are at stake.

Assuming that the principle appellant urges has some impact, though attenuated, in the present circumstances, Rule 801 is not vulnerable. For, as *Boyce* holds, "no more than a reasonable degree of certainty can be demanded," and "it is [not] unfair to require that one who deliberately[13] goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." 342 U.S. at 340. Numerous cases uphold *criminal* statutes against claims of supposed ambiguity, even though

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[13] Because appellant's act was characterized by elements of knowledge, see *infra* at 12, his vagueness attack on Rule 801 in this case is particularly ineffective. See, *e.g.*, *Boyce Motor Lines, Inc.* v. *United States*, *supra* at 342; *American Communications Ass'n* v. *Douds*, 339 U.S. 382, 413 (1952); *Screws* v. *United States*, 325 U.S. 91, 103 (1945).

they require statutory construction and interpretation to apply them to particular situations. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 618 (1954); *United States* v. *Petrillo*, 332 U.S. 1, 5-7 (1947). *A fortiori*, the same principle applies in upholding the validity of administrative regulations. See, *e.g.*, *United States* v. *Pope*, 189 F.Supp. 12, 20-21 (S.D.N.Y. 1960). It is perhaps indicative that except in rare instances vagueness attacks upon noncriminal statutes have not met with favor in the Supreme Court.[13]

In the context in which it appears, Rule 801 is a regulation of reasonable import. The rule applies to every member of a train or yard crew who is in a position to know that a car can or cannot be moved with safety. This is the formulation which first appears in this case during appellant's hearing before Superintendent of Transportation Davidson prior to appellant's discharge (J.A. 51, 52),[14] and thereafter in the statement of General Manager Manley to the Board of Appeals and Review[15] and elsewhere. Since Rule 801 is the first rule in that part of the regulations headed "Train or Yard Service," it is plain that it imposed a duty on brakemen such as appellant as well as the other members of train or yard crews.[16] Indeed, appellant had been examined as

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[13] See, *e.g.*, *Adler* v. *Board of Education*, 342 U.S. 485 (1952); *Jordan* v. *DeGeorge*, 341 U.S. 223 (1951); *American Communications Ass'n* v. *Douds*, *supra*; *B. & O. Rr. Co.* v. *Groeger*, 266 U.S. 521, 523-524 (1925); *but cf.*, *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233 (1925).

[14] Appellant's Br. at 26 appears to have overlooked the early appearance of this formulation in the case despite his thesis at that point in the brief.

[15] General Manager Manley, a man with personal experience as a train crewman, stated in his letter to the Board of Appeals and Review that "any railroader knows that Rule 801 applies to every member of the crew who is in a position to know that a car can or cannot be moved with safety" (J.A. 71).

[16] We think it noteworthy that of the remaining fourteen rules set out under the heading, only four confine their directives to named crewmen. The others speak in the very same terms as Rule 801 to crewmen engaged in train or yard service.

to the meaning of Rule 801 and was expected to know it (J.A. 91, 112). Responsibility is not extended by the rule to employees not in a position to know whether a car can be safely moved.

Appellant has personally acknowledged that he was in a position to know that the car could not be moved with safety (J.A. 51), and he has likewise acknowledged that a reasonable check of the physical conditions surrounding the car was necessary before movement could be permitted (J.A. 52, 53). In such circumstances his complaint that the rule inadequately informed him of its requirements is like complaining that he need not look before his eyes because no rule so commands. Of course Rule 801 must be read reasonably in light of its purpose which is to avoid accidents in the course of a dangerous activity.[17] The Commission appropriately held that appellant should have assured himself that the car could be moved with safety, and it held that he could not validly act on the basis of mere surmise (J.A. 85-86). We understand this to mean that Rule 801 requires each crew member to acquire knowledge or reliable information consistent with the circumstances.

> "The paramount importance of safety means that any railroad employee who is in a position to prevent an accident must make every reasonable effort to do so" (J.A. 71-72).[18]

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[17] The purpose and intendment of the rule, as well as its operation, have been set out in the submission of General Manager Manley to be found in the Joint Appendix (especially J.A. 65-77). Because these highly relevant matters are there fully analyzed and discussed, we do not further reiterate them here. However, we state that in our view an appropriate understanding of the necessity and effect of Rule 801 may not be had without study of this submission.

[18] In this connection it is important to note that appellant's attempt to characterize himself as the "junior" member of the crew is without effect on his responsibility under the rule. See Appellant's Br. 5; compare J.A. 116-118. Were this not the case, of course, rank and file railroad crewmen would be invited to satisfy themselves with less than full effort toward safety. See J.A. 71-72.

The rule, on the one hand, cannot be construed to require each employee to duplicate each safety check he knows has been made by another employee.[19] Nor, obviously, can it be construed to require employees located elsewhere in the performance of other required duties to leave their posts and make on the scene checks other employees are in a position to make.[20] On the other hand, it cannot be understood to permit an employee to omit a safety check he is in a position to make, on the mere assumption that another employee has made the necessary check.[21] Still less may the rule be construed to permit such an employee to ignore a safety check which he knows or has reason to believe no one else has undertaken.[22]

In this perspective appellant's multiplication of hypotheticals in his brief shows less absurdity in the rule than in the semantics he sets forth. The answers in the rule are both real and clear. The Commission's reading of the rule is its reasonable and logical construction, and gave appellant fair and adequate notice of his responsibility.[23]

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[19] Compare Appellant's Br. 27-28.

[20] Compare Appellant's Br. 23-25.

[21] See the ruling of the Board of Appeals and Review (J.A. 85-86).

[22] The record makes plain that appellant knew that Mr. Nichols did not physically check the car. In stating that he surmised Nichols checked the car, it is clear that appellant surmised that Nichols made a visual check only from either the ground near the rear platform of the locomotive or the rear platform itself. See J.A. 44, 52, 53, 90.

[23] In support of his contention that Rule 801 is too vague to be enforced, appellant relies upon a letter dated September 1, 1965 by the then-Assistant Secretary for Administration of the Department of the Interior. The letter was not part of the administrative record, and so cannot be a basis for questioning the Commission's action. This Court has said: "Judicial review of administrative action is limited to matters on which the agency has had an opportunity to pass." *California Interstate Tel. Co.* v. *Federal Communication Commission*, 117 U.S. App. D.C. 255, 258, 328 F.2d 556, 559 (1964). *Cf. Albertson* v. *Federal Communications Commission*, 100 U.S. App. D.C. 103, 105-106, 243 F.2d 209, 211-212 (1957).

Should the Court be inclined to consider the letter, the counter-

II. The evidence provides a rational basis for the administrative disciplinary action taken against appellant.

Appellant next contends that there is no evidence of substance in the administrative record to support a rational determination that appellant violated Rule 801.[24] Relying on inferences drawn from an allocation of functions and based on his own statements at various stages of the administrative process, appellant urges that in performing his other duties he could somehow relieve himself of the requirement of safe operation imposed by the rule. Insofar as his obligation of safety is concerned, appellant has drawn a distinction without a difference.

The scope of review in federal employee discharge cases is narrow. The controlling rule in this Circuit is well summed up in *McTiernan* v. *Gronouski*, 337 F.2d 31, 34 (2nd Cir. 1964):

> "[The courts] approach the issues raised . . . mindful of the limited permissible scope of judicial re-

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exhibits of appellee consisting of affidavits of Secretary of the Interior Udall and General Manager Manley should also be examined (J.A. 102-106). The former affidavit states that, because of the importance of Rule 801 in assuring railroad safety, the Secretary has considered the inference appellant draws from the letter of September 1, 1965. The Secretary states:

> "Insofar as the letter may be construed to express doubt upon the clarity of Rule 801, I wish to state that the Department's position is that there is no doubt about the validity of Rule 801; and specifically that the Rule is not void for indefiniteness.
>
> Rule 801 places the responsibility for preventing accidents due to the movement of cars upon each member of a train or yard crew who is in a position to check whether a car can be moved with safety. A member of a crew in a position to determine whether a car can be moved with safety cannot excuse his failure to perform this duty by assuming that some other member of the crew was making the necessary check."

Mr. Manley's affidavit, to the same effect, goes into greater detail concerning the necessity for Rule 801 and for its assignment of responsibility, as thus defined.

[24] Appellant's Br. 30-37. Although appellant has separated the questions involved into two arguments, we feel they may be treated adequately in unitary form.

> view. . . . The taking of disciplinary action against government employees, including the invocation of the sanction of dismissal, is a matter of executive discretion, and is subject to judicial supervision only to the extent required to insure 'substantial compliance with the pertinent statutory procedures provided by Congress,' Hargett v. Summerfield, 100 U.S. App. D.C. 85, 243 F.2d 29, 32 (D.C. Cir. 1959), and to guard against arbitrary or capricious action. Pelicone v. Hodges, 116 U.S. App. D.C. 32, 320 F.2d 754, 755 (1963)."

Where the court ascertains that the certified Civil Service Commission records provide "a rational basis for the conclusions reached" and "all requirements of law are complied with," the court will "not step in and substitute its own judgment" for that of the Commission. *Eustace* v. *Day*, 114 U.S. App. D.C. 242-243, 314 F.2d 247-248 (1962). The court may not substitute a different judgment of its own even where there "may be ground for reasonable differences of opinion" in the matter. *Studemeyer* v. *Macy*, 116 U.S. App. D.C. 120, 121, 321 F.2d 386, 387, *cert. denied*, 375 U.S. 934 (1963). Nevertheless, it is precisely such a different judgment which appellant here in effect seeks to invoke.

The record shows that it was unsafe to move the box car without a physical check;[25] that appellant at best merely surmised that a check of some kind had been made;[26] that on this assumption he released the hand

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[25] Appellant has repeatedly emphasized the darkness of the night and the thinness of the connecting platform. See Appellant's Br. 6, 8, 10; J.A. 15. In contrast to the unreliability of a visual check under such conditions, a physical check would certainly have disclosed the platform which obstructed passage between the box car and warehouse. See J.A. 76.

[26] As we have indicated earlier, the record makes clear that appellant knew Mr. Nichols had not made a physical check. Appellant surmised that a visual check only had been made. See footnote 22, *supra*. Yet he conceded the necessity of a physical check and participated in moving the car without one only because he felt such a check was not his responsibility. See J.A. 52-53, 55.

brake on the box car without assuring himself that the car could be moved with safety; and that appellant was physically able to ascertain the presence of the obstructing platform, to which the car was connected on the same side of and only 20 or 25 feet from his position on the open end of the locomotive.[27] In short, the record shows that, on the facts known to appellant, a needless chance was being taken in moving the box car. There is, therefore, a rational and substantial basis in the record for the disciplinary action taken.

In its decision, the Commission held that Rule 801 fixed responsibility upon appellant, as well as on the conductor and the other brakeman, in the circumstances of the accident. The fact that the crew moved quickly, with appellant releasing the brake and Mr. Nichols making the coupling while all three men were in a position to make a safety check, relieves none of the three of his responsibility for assuring that the car could be safely moved. The Commission declined to attach to the performance of these functions in the immediate vicinity of the engine and single car being coupled any such relief from responsibility for safety as appellant demands.[28] Not only the circumstances discussed but other matters of record before the Commission demonstrate the necessity and wisdom of conducting the inherently dangerous operation of yard service with the maximum concern for safety here shown.[29] Members of a yard crew cannot be permitted to

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[27] See J.A. 44, 46, 51-53. It is necessary to point out that these references belie appellant's *post hoc* assertion that he was not in a position to check which has been adopted in his brief. See Br. 32; J.A. 96. Indeed, appellant admitted: "I didn't even look" (J.A. 52).

[28] The rationale of this point is fully set forth in the General Manager's argument (J.A. 71-72). We merely point out that appellant's distinction in function between himself and Mr. Nichols, if meaningful at all in this context, is vitiated by the fact that this was a one-car train. See J.A. 118.

[29] The record contains material which helps to put appellant's present claims in their proper perspective. In prior cases, the

excuse failure to fulfill their responsibility under the rules by showing that others also violated their responsibility.[30] The Commission's decision was reasonable and well within its authority to make.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
NATHAN DODELL,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

National Railroad Adjustment Board has ruled:

> "'Safety first' is an unwritten rule on all American railroads. . . . Our findings in such cases should not be affected by failure to cite a specific safety rule or even by the fact that there is no specific safety rule covering a particular accident" (J.A. 78-79).
>
> "[P]etitioner here seeks his reinstatement because of asserted customary practice and equal negligence of other employees in bringing about the accident. Neither can absolve claimant from blame" (J.A. 81).
>
> "Claimant admits that had he walked to the north end of this car, he could have seen the unloading ramp. His admitted nonobservance of the rules compels a denial award" (J.A. 82).

In each case the claim was properly denied.

[30] Despite appellant's saving attempt in his brief, appellant appears to have conceded this point. See Appellant's Br. 37, n. 19; J.A. 94.

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